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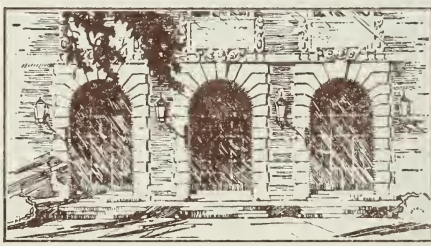
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BROWNE AND WATTS'

Law and Practice

IN

DIVORCE & MATRIMONIAL CAUSES.

EIGHTH EDITION.

BY


J. H. WATTS,

OF THE INNER TEMPLE AND THE SOUTH-EASTERN CIRCUIT,
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PREFACE

TO THE EIGHTH EDITION.



THE present Edition of this book has been re-written in parts, and all the new cases of any importance have been incorporated.

As in the previous Edition, the Work has been divided into two parts, Part I. being devoted to Law and Part II. to Practice.

In previous Editions the List of Cases did not include the names of co-respondents; these have now been added, so that the reader can at once see whether the suit was a petition by the husband or the wife.

My thanks are due to Mr. H. B. DURLEY GRAZEBROOK, Junr., who has given me the greatest help, and has also gone through the Cases for me.

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18602

My thanks are also due to the learned Authors of MACQUEEN'S "Law of Husband and Wife," LUSH'S "Law of Husband and Wife," and "The Comparative Law of Marriage and Divorce."

JOHN H. WATTS.

5, PUMP COURT,
TEMPLE.

November, 1912.

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PART I.



A SUMMARY

OF

The Law

RELATING TO

DIVORCE AND MATRIMONIAL CAUSES.

THE
PRINCIPLES AND PRACTICE
IN
DIVORCE AND MATRIMONIAL CAUSES.

CHAPTER I.

JURISDICTION . . . . .	1—23

“THE Probate, Divorce, and Admiralty Division of the High Court of Justice” inherits from the Court of Divorce and Matrimonial Causes, for which it was substituted by the Judicature Acts of 1873-75, power (partly given by the substantive enactments of the Matrimonial Causes Act, 1857, and subsequent statutes, and partly derived from the jurisdiction of the Ecclesiastical Courts transferred to the old Court by the 6th section of that Act) to pronounce decrees of—

1. Dissolution of Marriage.
2. Judicial Separation.
3. Nullity of Marriage.
4. Restitution of Conjugal Rights.
5. Jactitation of Marriage.
6. To establish Legitimacy and the Validity of Marriages, and the right to be deemed Natural Born Subjects (*a*).

Subject-matter.

Original petitions, what are.

These may be called decrees in original petitions, but, besides these decrees, the Court has jurisdiction in matters

(*a*) Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93).
D.M.C.

Subsidiary
petitions.

subsidiary to or consequent on such original matters,
as—

7. Reversal of Decree of Judicial Separation.
8. Damages against an Adulterer, and how such are to be applied.
9. Custody of Children.
10. Provision for Wife.
11. Concerning Settlements of the Property of Parties to certain Matrimonial Suits.
12. An Appellate Jurisdiction from the decisions of Magistrates in certain cases (*b*).
13. Concurrent Jurisdiction with every other Division of the High Court of Justice by virtue of the Judicature Acts, 1873, 1875.

Foreign,
meaning of
term in
Divorce
Court.

In the Divorce Court (*c*), the terms “foreign” and “abroad” mean everywhere out of England proper, which term includes England, Wales, and the town of Berwick-upon-Tweed.

Not very long after the creation of the Divorce Court, Sir Cresswell Cresswell said: “It is a Court for England, not for the United Kingdom or for Great Britain: and, for the purposes of this question of jurisdiction, Ireland and Scotland are to be deemed foreign countries equally with France or Spain” (*d*).

Isle of Man.
Channel
Islands.

Similarly, the Isle of Man (*e*), the Channel Islands (*f*),

(*b*) Mat. C. Act, 1878 (41 Vict. c. 19), s. 4; Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39).

(*c*) Since the coming into operation of the Judicature Acts it is of course incorrect to speak of the “*Divorce Court*.” I have used the expression here and occasionally elsewhere for convenience, applying it to the Probate, Divorce, and Admiralty Division

when exercising jurisdiction in causes matrimonial.

(*d*) *Yelverton v. Yelverton* (1859), 1 S. & T. 574, at p. 586; 29 L. J. P. 34; 1 L. T. 194. See also *Bond v. Bond* (1860), 2 S. & T. 93; 29 L. J. P. 143.

(*e*) *Davison v. Farmer and Grace* (1851), 6 Ex. 242; 20 L. J. Ex. 177.

(*f*) *Le Sueur v. Le Sueur* (1876), 1 P. D. 139; 45 L. J. P. 73; 34 L. T. 511.

and the Colonies, are foreign countries for the purposes of the Divorce Court. Colonies.

In the case of *Niboyet v. Niboyet* (g), it was held in the Court of Appeal by James and Cotton, LL.JJ., Brett, L.J., dissenting, overruling the decision of Sir Robert Phillimore in the Court below, that, although the parties to a marriage might never have acquired an English domicile, the English Divorce Court had power to dissolve their marriage if they had a *bonâ fide* residence, a matrimonial home in fact, in this country. *Niboyet v. Niboyet.*

But in the case of *Le Mesurier v. Le Mesurier and Others* (h) the Judicial Committee of the Privy Council held that: while mere residence in a country may be sufficient to justify the Courts of that country in ordering aliment or decreeing judicial separation, the only true test of jurisdiction to decree a divorce, according to international law, is the domicile for the time being of the married pair. *Le Mesurier v. Le Mesurier and Others.* Effect of.

Of course technically it is impossible to say that a decision of the Judicial Committee can overrule a decision of the Court of Appeal, even though, as in the case of *Niboyet v. Niboyet* (i), the Lords Justices differed. But taking into consideration the fact that the members of Council who decided the case of *Le Mesurier v. Le Mesurier and Others* consisted of the Lord Chancellor (Lord Herschell), Lord Watson, Lord Hobhouse, Lord Macnaghten, Lord Morris, and Sir Richard Couch, five out of six members being peers, there can be little doubt that it expresses what would be the view taken by the House of Lords, should the point ever come before it. I think, therefore, it may safely be assumed that the decision of the majority of the Court of Appeal in *Niboyet*

(g) (1878), 4 P. D. 1; 48 L. J. See also Sinclair's Divorce Bill, P. 1; 39 L. T. 486. (1897) A. C. 469.

(h) (1895) A. C. 517; 64 (i) *Supra*.
L. J., P. C. 97; 72 L. T. 873.

v. *Niboyet* is no longer of any practical value as an authority.

If this be so, it may now be taken as settled law that, in order to found the jurisdiction of the Court in suits for dissolution of marriage, the parties must be domiciled in this country.

In all other suits it would seem one or other of the two elements, domicile or residence, must be present in the case, with the exception of suits for nullity of marriage, in which the Court has jurisdiction to inquire into the validity of any marriage contracted in England, no matter whether the parties to it be British or foreign (*k*).

Dicey on
"Conflict of
Laws,"
extracts from.

It is therefore of the last importance, in considering the jurisdiction of the Court, to have a clear conception of the exact meaning and nature of the word "domicil." I have therefore—subject only to a few trifling verbal alterations—extracted the following definitions and rules from Professor Dicey's well-known work (*l*):—

"Domicil,"
what is?

"'Domicil' means the country which . . . is considered by law to be a person's permanent home.

"Independent person."

"'Independent person' means a person who, as regards his domicile, is not legally dependent upon the will of any other person.

"Dependent person."

"'Dependent person' means any person who is not an independent person as hereinbefore defined, and includes:—

"(i) a minor;

"(ii) a married woman.

(*k*) *Simonin (falsely called Mallac) v. Mallac* (1860), 2 S. & T. 67; 29 L. J. P. 97; 2 L. T. 327; *Sottomayor (otherwise De Barros) v. De Barros* (1877), 3 P. D. 1; 47 L. J. P. 23; 37 L. T. 415; *Roberts (otherwise Brennan) v. Brennan*, (1902) P. 143; 71 L. J. P. 74; 86 L. T. 599. See also *Armtyage v. Armtyage*, (1898) P. 178; 67

L. J. P. 90; 78 L. T. 689; *Ogden v. Ogden (or Philip)*, (1908) P. 46; 77 L. J. P. 34; 97 L. T. 827; *Chetti (Venugopal) v. Chetti (Venugopal)*, (1909) P. 67; 78 L. J. P. 21; 99 L. T. 885.

(*l*) "The Conflict of Laws," by A. V. Dicey, 2nd ed. (1908) p. 68, and pp. 82—160.

“RULE 1.—The domicile of any person is, in general, the place or country which is, in fact, his permanent home, but is in some cases the place or country which, whether it be in fact his home or not, is determined to be his home by a rule of law. Dacey on
“Conflict of
Laws,”
extracts from.

“RULE 2.—No person can at any time be without a domicile.

“RULE 3.—Subject to the exception hereinafter mentioned, no person can have at the same time more than one domicile.”

Exception.—A person within the operation of the Domicile Act, 1861, 24 & 25 Vict. c. 121, may possibly have one domicile for the purpose of testate or intestate succession, and another domicile for all other purposes.

“RULE 4.—A domicile once acquired is retained until it is changed, Domicil,
how changed.

“(1) in the case of an independent person, by his own act;

“(2) in the case of a dependent person, by the act of some one on whom he or she is dependent.

“RULE 5.—Every independent person has at any given moment either—

“(1) the domicile received by him at his birth (which domicile is hereinafter called the domicile of origin); or Domicil of
origin,

“(2) a domicile (not being the same as his domicile of origin) acquired or retained by him while independent by his own act (which domicile is hereinafter called a domicile of choice). of choice,

“RULE 6.—Every person receives at (or as from) birth a domicile of origin—

“(1) In the case of a legitimate child born during his father's lifetime, the domicile of origin of the child is the domicile of the father at the time of the child's birth. of legitimate
infant,

“(2) In the case of an illegitimate or posthumous illegitimate,

Dicey on
"Conflict of
Laws,"
extracts from.

foundling,
legitimated
person.

child, the domicile of origin is the domicile of his mother at the time of his birth.

"(3) In the case of a foundling, the domicile of origin is the country where he is born or found.

"(4) In the case of a legitimated person, the domicile which his father had at the time of such person's birth becomes and is considered to be the domicile of origin of such person.

"RULE 7.—Every independent person can acquire a domicile of choice, by the combination of residence (*factum*) and intention of permanent or indefinite residence (*animus manendi*), but not otherwise.

Domicil, how
long retained.

"RULE 8.—

"(1) The domicile of origin is retained until a domicile of choice is in fact acquired.

"(2) A domicile of choice is retained until it is abandoned, whereupon either—

- (i) a new domicile of choice is acquired; or
- (ii) the domicile of origin is resumed.

Dependent
person,
domicil of.

"RULE 9.—The domicile of every dependent person is the same as, and changes (if at all) with, the domicile of the person on whom he is, as regards his domicile, legally dependent.

"SUB-RULE 1.—Subject to the exceptions hereinafter mentioned, the domicile of a minor is during minority determined as follows:—

"(1) The domicile of a legitimate or legitimated minor is, during the lifetime of his father, the same as, and changes with, the domicile of his father.

"(2) The domicile of an illegitimate minor, or of a minor whose father is dead, is, whilst the minor lives with his mother, the same as, and changes with, the domicile of the mother.

"(3) The domicile of a minor without living parents, or of an illegitimate minor without a living

Infants,
domicil of,
general
observations
as to.

mother, possibly is the same as, and changes with, the domicile of his guardian, or may be changed by his guardian.

Dacey on
"Conflict of
Laws,"
extracts from.

"Exception (1) to Sub-Rule: The domicile of a minor is not changed by the mere re-marriage of his mother.

"Exception (2) to Sub-Rule: The change of a minor's home by a mother or guardian does not, if made with a fraudulent purpose, change the minor's domicile.

"SUB-RULE 2.—The domicile of a married woman is during coverture the same as, and changes with, the domicile of her husband.

Married
woman.

"RULE 10.—A domicile cannot be acquired by a dependent person through his own act.

Dependent
person.

"SUB-RULE 8.—Where there is no person capable of changing a minor's domicile, he retains, until the termination of his minority, the last domicile which he has received.

Infant.

"RULE 11.—The last domicile which a person receives whilst he is a dependent person continues, on his becoming an independent person, unchanged until it is changed by his own act.

Dependent
person.

"SUB-RULE 1.—A person on attaining his majority retains the last domicile which he had during his minority until he changes it.

Infant on
attaining
majority.

"SUB-RULE 2.—A widow retains her late husband's last domicile until she changes it.

Widow.

"SUB-RULE 3.—A divorced woman retains the domicile which she had immediately before, or at the moment of divorce, until she changes it.

Divorced
woman.

"RULE 12.—The domicile of a person can always be ascertained by means of either—

Domicil,

"(1) a legal presumption; or

"(2) the known facts of the case.

how ascer-
tained,

"RULE 13.—A person's presence in a country is presumptive evidence of domicile.

"RULE 14.—When a person is known to have had a legal pre-
sumptions
as to.

Dicey on
"Conflict of
Laws,"
extracts from.

Evidences of
domicil.

domicil in a given country he is presumed, in the absence of proof of a charge, to retain such domicil.

"RULE 15.—Any circumstance may be evidence of domicil which is evidence either of a person's residence (*factum*), or of his intention to reside permanently (*animus manendi*) within a particular country.

"RULE 16.—Expressions of intention to reside permanently in a country are evidence of such an intention, and, in so far, evidence of domicil.

"RULE 17.—Residence in a country is *primâ facie* evidence of the intention to reside there permanently (*animus manendi*), and, in so far, evidence of domicil.

"RULE 18.—Residence in a country is not even *primâ facie* evidence of domicil when the nature of the residence either is inconsistent with, or rebuts the presumption of the existence of, an intention to reside there permanently (*animus manendi*)."

Persons whose employment rebuts presumption of residence are defined by Professor Dicey to be:—

"(1) Prisoners.

"(2) Convicts.

"(3) Exiles or refugees.

"(4) Lunatics.

"(5) Invalids residing abroad on account of health.

"(6) Officials generally.

"(7) Ambassadors.

"(8) Consuls.

"(9) Persons in military or naval service.

"(10) Persons in Indian service.

"(11) Ecclesiastics.

"(12) Servants.

"(13) Students."

We see then from the above that there are three kinds of domicil:—

(1) Domicil of origin.

(2) Domicil by law.

(3) Domicil of choice.

The following are a few dicta and judicial decisions on the subject of domicile:—

“Domicil generally.” This is defined by Lord Wensleydale as “Habitation in a place with the intention of remaining there for ever, unless some circumstances should occur to alter that intention” (*m*). Judicial dicta.,
Domicil generally.

“Domicil of origin.” This is not the place where a person happens to be born, but the home of his parents (*n*); that is, of course, in cases where the parents are known, as explained in Professor Dicey’s rules, as given above (*o*). Domicil of origin.

“The domicile of origin is that arising from a man’s birth or connections”; but the term “domicil of origin” is more correct than “domicil of birth,” for the mere accident of birth does not of itself affect the domicile, as if the son of an Englishman were born on a journey in foreign parts, his domicile would follow that of his father (*p*).

“The domicile given by law.” This includes those to whom the law assigns the domicile of others on whom they depend; the wife during marriage, the minor, &c. (*q*). Domicil by law

The husband’s actual and the wife’s legal domicile are *primâ facie* one, wherever the wife may be personally resident (*r*). By marriage, the domicile of the husband becomes that of the wife (*s*). of wife,

The domicile of a child is that of his father, and he is unable during pupillage or until he is *sui juris* to acquire another (*t*). But where an infant’s domicile of birth is of child,

(*m*) *Whicker v. Hume and Others* (1858), 7 H. L. C. 124; (1801), 5 Ves. 749A, 787.

28 L. J., Ch. 396; 4 Jur., N. S. 165. (*q*) Phill. P. & M. of Jurispr.

933. (*r*) *Chichester v. Donegal*, 1 Add. 19.

(*n*) Phill. P. & M. of Jurispr. 165. (*s*) *Dalhousie v. McDouall*, 7

(*o*) For a case as to the domicile of origin of the children of a naturalized British subject, see *Bourgeoise, In re*, 41 Ch. D. 310; Cl. & Fin. 817. See also *Turner (falsely called Thompson) v. Thompson* (1888), 13 P. D. 37, 58 L. T. 431. reported as *T. v. T.*, 57 L. J. P. 40; 58 L. T. 387.

(*p*) *Somerville v. Somerville* (*t*) *Somerville v. Somerville*

Domicil.

of widow.

Domicil of wife.

changed during infancy by a change of domicil on the part of the father, it would seem that the altered domicil cannot be regarded as the infant's domicil of origin (*u*). And if the father die, a domicil acquired by the surviving mother becomes the domicil of the infant (*x*). But where a widow changes her domicil, as by marrying again, it does not necessarily follow that she imposes such change of domicil on her infant child (*y*).

Not only is the husband's domicil the legal domicil of the wife, but she cannot acquire a separate domicil for herself, even though her husband may have been guilty of conduct which would furnish her with a good defence to a suit by him for restitution of conjugal rights (*z*). So where a domiciled Englishman married a native of the United States, and she left him, and went back to her native State, and there took proceedings against him for a divorce, and the husband refused to recognize the American Court and did not appear; the English Court held that the American decree dissolving the marriage was not binding here, and could not affect the husband's rights in this country (*a*). This rule has been held to apply, though the parties are living apart with or without a deed of separation (*b*), even where the husband is guilty of adultery and desertion (*c*).

(1801), 5 Ves. 749A, 787; *Patten, In goods of* (1860), 6 Jur., N. S. 151.

(*u*) *Craignish, In re; Craignish v. Hewitt*, (1892) 3 Ch. 180; 67 L. T. 689, C. A.

(*x*) *Potinger and Others v. Wightman and Others* (1817), 3 Meri. 67.

(*y*) *Beaumont, In re*, (1893) 3 Ch. 490; 62 L. J., Ch. 923.

(*z*) *Yelverton v. Yelverton* (1859), 1 S. & T. 574; 29 L. J. P. 34; 1 L. T. 194; *Whitcomb v. Whitcomb* (1840), 2 Curt. 351.

See also *Chichester v. Donegal*, 1 Add. 19; *Dalhousie v. McDouall*, 7 Cl. & Fin. 817.

(*a*) *Green v. Green and Sedgwick*, (1893) P. 89; 62 L. J. P. 112; 68 L. T. 261.

(*b*) *Daly, In re* (1858), 27 L. J., Ch. 751; *Warrender v. Warrender*, 2 Cl. & Fin. 488.

(*c*) *Dolphin v. Robins and Paxton* (1859), 7 H. L. C. 390; 29 L. J. P. 11; *Le Sueur v. Le Sueur* (1876), L. R., 1 P. & D. 139; 45 L. J. P. 73; 34 L. T. 511.

But it is otherwise after the wife has obtained a judicial separation (*d*), and *à fortiori* where a decree of dissolution has been pronounced (*e*); neither is the domicile of the wife that of the husband to such an extent as to compel her to submit to the jurisdiction of the tribunals of any country in which he may choose to acquire a domicile (*f*).

Domicil.
After judicial
separation.

“Domicil of choice” arises where a person, having the power of changing his domicile, voluntarily abandons his existing domicile and settles in another country with the intention of permanently residing there (*animo manendi* (*g*)). Questions of change of domicile are proverbially difficult to determine, owing to the ambiguity of ordinary conduct. Thus a person may have lived many years abroad without having acquired a foreign domicile, if it appears that his reason for doing so was a desire to avoid his creditors or the like (*h*).

Domicil of
choice.

So an ambassador or other public officer does not acquire a domicile in the country where he resides as a matter of duty, although, under certain circumstances, a foreign ambassador was held to have acquired an English domicile (*i*). No presumption in favour of acquiring a domicile of choice arises from residence in a foreign country whilst on naval or military duty (*k*).

Ambassador,
&c.

Officer in
army or
navy.

(*d*) *Williams v. Dormer* (1852),
2 Robert. 505; 16 Jur. 366.

(*e*) *Scott v. Att.-Gen.* (1886),
11 P. D. 128; 55 L. J. P. 57;
56 L. T. 924.

(*f*) *Pitt v. Pitt* (1864), 10 Jur.,
N. S. 735; 4 Macq. H. L. Cas.
627; 10 L. T. 626; *Briggs v.*
Briggs (1880), 5 P. D. 163; 49
L. J. P. 38.

(*g*) *Lord v. Colvin* (1859), 28
L. J., Ch. 361. See also *Cross,*
Ex parte, Duleep Singh, In re
(1890), 7 M. B. R. 228. See
also *Udny v. Udny* (1869), L. R.,

1 Sc. App. 458; *McMullen v.*
Wadsworth, 14 App. Cas. 631;
59 L. J., P. C. 7; 61 L. T. 487.

(*h*) *Bell v. Kennedy and*
Others (1868), L. R., 1 Sc. App.
321.

(*i*) *Heath v. Sansom* (1851),
14 Beav. 441. See also *Niboyet*
v. Niboyet (1878), 4 P. D. 1;
48 L. J. P. 1; 39 L. T. 486.

(*k*) *Brown v. Smith* (1852), 15
Beav. 444; 21 L. J., Ch. 356;
Patten, In goods of (1860), 6
Jur., N. S. 151; *Hodgson v. De*
Beauchesne (1858), 12 Moore, P.
C. C. 285; *Jopp v. Wood*, 11

Domicil
of choice.

Presumption
of law.

Acquired
domicil not
lost by mere
abandon-
ment.

Acquisition
of new
domicil ques-
tion of fact.

The burden of proof is on the party setting up the abandonment of the domicil of origin (*l*), for the presumption of law is against such an intention (*m*). Slighter evidence is, however, required to warrant the conclusion that a man intends to abandon an acquired domicil to resume his domicil of origin, than is necessary to justify the conclusion that he means to abandon his domicil of origin and acquire a new one (*n*).

An acquired domicil is not lost by mere abandonment (*o*), for to effect a change of domicil there must be an actual intention to abandon the old domicil and acquire a new one (*p*).

Mere expressions of intention not to renounce a domicil of origin cannot prevail against the evidence of intention collected from the acts of the party and the general facts and circumstances of the case, if those are otherwise sufficient to constitute a domicil abroad (*q*). On the other hand, the mere declaration of an intention to change a domicil, without an actual change of residence, is inoperative to create a new domicil (*r*).

The question whether or not a person has acquired a domicil of choice is not a question of law but of fact, and has to be decided by the evidence in each particular case. Thus in *Wilson v. Wilson* (*s*), a Scotchman married a

L. T. 406; *Drevon v. Drevon* (1864), 34 L. J., Ch. 129; 10 L. T. 370.

(*l*) *Crookenden v. Fuller* (1859), 1 S. & T. 441; 29 L. J. P. 1; 1 L. T. 70; *Att.-Gen. v. Rowe* (1862), 1 H. & C. 31; 31 L. J., Ex. 314; 6 L. T. 438.

(*m*) *Hodgson v. De Beauchesne* (1858), 12 Moore, P. C. C. 285; *Att.-Gen. v. Rowe*, 1 H. & C. 31; 31 L. J., Ex. 314; 6 L. T. 438.

(*n*) *Lord v. Colvin* (1859), 28 L. J., Ch. 361.

(*o*) *Munroe v. Douglas* (1820), 5 Madd. 379.

(*p*) *Att.-Gen. v. Blucher de Wahlstadt* (1864), 3 H. & C. 374; 34 L. J., Ex. 29; 11 L. T. 454.

(*q*) *Steer, In re* (1858), 3 H. & N. 594; 28 L. J., Ex. 22.

(*r*) *Brown v. Smith* (1852), 15 Beav. 444; 21 L. J., Ch. 356; *Aikman v. Aikman and Aikman* (1861), 3 Macq. H. L. Cas. 854; 7 Jur., N. S. 1017; 4 L. T. 374.

(*s*) 2 L. R., P. & D. 435; 41 L. J. P. 74; 27 L. T. 351.

Scotch woman in Scotland, and cohabited with her in Scotland, until he discovered her adultery; he thereupon, in 1866, broke up his home and removed to England; and in 1871 he instituted a suit in England for the dissolution of his marriage, on the ground of the adultery committed in Scotland previous to the separation: he swore in his examination that he had left Scotland with the intention of taking up his permanent abode in England. The Court, believing his evidence, held that he had abandoned his domicile of origin, and acquired an English domicile, and that it had jurisdiction to dissolve the marriage (*t*). Domicil
of choice.
—

The following are some of the more recent decisions on the subject of domicile of choice:—

Evidence of subsequent as well as prior acts is admissible for the purpose of ascertaining a person's domicile at

(*t*) It is scarcely within the scope of this work to multiply cases on the subject of domicile, but the following are some of the cases cited by the late Mr. Browne in the earlier editions of his book on "Divorce," on the point "whether an individual has or has not lost his domicile of origin: *Somerville v. Somerville* (1801), 5 Ves. 749A, 787; *Dalhousie v. McDouall*, 7 Cl. & Fin. 817; *In re de Capdevielle* (1864), 2 H. & C. 985; 33 L. J., Ex. 306; *Bempde v. Johnstone*; *Graham v. Johnstone* (1796), 3 Ves. 198; *Manning v. Manning* (1871), L. R., 2 P. & D. 223; 40 L. J. P. 128; 24 L. T. 196; *Craigie and Craigie v. Lewin and Other* (1843), 3 Curt. 435; 7 Jur. 519; *Platt and Another v. Att.-Gen. of New South Wales* (1878), L. R., 3 App. Ca. 336; 47 L. J.,

P. C. 26; 38 L. T. 74; *Doucet v. Geoghegan* (1878), 9 Ch. D. 441; *Mazrwell v. McClure* (1860), 3 Macq. H. L. Cas. 852; 2 L. T. 65; *Moorhouse and Wife v. Lord and Others* (1863), 32 L. J., Ch. 295; 10 H. L. C. 272; 8 L. T. 212; *United States (Pres.) v. Drummond* (1864), 32 L. J., Ch. 501; 33 Beav. 449; *Laneuville v. Anderson and Guichard* (intervening) (1860), 2 S. & T. 24; 30 L. J., P. & M. 25; 3 L. T. 304; *Att.-Gen. v. Fitzgerald* (1856), 25 L. J., Ch. 743; *Allardice v. Onslow* (1864), 33 L. J., Ch. 434; 9 L. T. 674; *Hepburn v. Skirving* (1861), 9 W. R. 764; *Att.-Gen. v. Pottinger* (1861), 31 L. J., Ex. 284; 4 L. T. 368; 6 H. & N. 733; *Att.-Gen. v. Kent and Others* (1862), 31 L. J., Ex. 391; 6 L. T., N. S. 864.

Domicil.
Of choice.

a given period (*u*). Domicil is established not by assertion but by conduct (*x*).

Evidence
as to.

A husband and wife, both of English parents, resident in France, married in England, and subsequently cohabited in France. The husband, on coming of age, made a declaration of his intention to retain his English nationality. Both he and his father intended returning to England, when they had made enough money. The husband subsequently deserted his wife, and led a wandering life in Australia and New Zealand. Held, that his domicil was English (*y*). Where the domicil of all the parties to a marriage was English, and the husband subsequently endeavoured to found a fictitious domicil in Scotland, to enable his wife to obtain a decree in the Scotch Courts, by getting an address in Glasgow and pretending to carry on the business of a tea merchant there, it was held that he had not acquired a Scotch domicil (*z*).

A husband whose domicil of origin was English entered the Ceylon Civil Service, and acquired a domicil there. Subsequently he took rooms in England, intended to have his children educated here, that his wife should remain here until their education was finished, and that they should remain here even if he were obliged to return to Ceylon, and the husband intended to rejoin them, either on leave or after his retirement from the Ceylon Civil Service; the Court held that his domicil was English (*a*).

(*u*) *Grove, In re; Vaucher v. Sol. to Treasury* (1888), 40 Ch. Div. 216; 58 L. J., Ch. 57; 59 L. T. 587.

(*x*) *McMullen v. Wadsworth*, 14 App. Cas. 631; 59 L. J., P. C. 7; 61 L. T. 487.

(*y*) *Goulder v. Goulder*, (1892) P. 240; 61 L. J. P. 117.

(*z*) *Bonaparte v. Bonaparte (otherwise Megone)*, (1892) P. 402; 62 L. J. P. 1; 67 L. T. 531.

(*a*) *Hurley v. Hurley*, 67 L. T. 384. For a case, in which it was held that the facts were sufficient to show that a person had abandoned his domicil of origin and

I now propose to notice a series of later cases, commencing with *Le Sueur v. Le Sueur* (b), decided in March, 1876. The earlier cases, so far as they are any longer of value, are fully noticed by the learned Judges who decided these cases, to whose judgments I must refer those who require fuller information on this most important subject.

I have taken the cases in the order in which they are reported, but, as will be seen, this is not always the order in which they came before the Court.

In *Le Sueur v. Le Sueur* (b), the parties were originally domiciled in Jersey, married in Jersey, and cohabited in Jersey. After the husband had deserted her and gone to America, *and not before*, the wife came to reside in England, where she filed a petition for the dissolution of her marriage on the ground of her husband's adultery and desertion.

The only question was whether the wife, by coming to

acquired a domicile of choice, see *Att.-Gen. v. Winans* (1901), 85 L. T. 508; and for a later case, in which the direct opposite was held by the Scotch Courts, see *Brooks v. Brooks's Trustees*, 4 F. 1014, Ct. of Session; Annual Digest, 1903 (Mews'), 129.

(b) (1876), 1 P. D. 139; 45 L. J. P. 73; 34 L. T. 511. See also the following cases, cited in the judgment of Sir Robert Phillimore: *Dolphin v. Robins and Paxton* (1859), 7 H. L. 417, 418; *Williams v. Dormer* (falsely called *Williams*) (1852), 2 Robert. 505; *Deck v. Deck* (1860), 2 S. & T. 90; 29 L. J. P. 129; 2 L. T. 542; *Tollemache v. Tollemache* (1859), 1 S. & T. 557; 30 L. J. P. 113; 2 L. T. 87; *Yelverton v. Yelverton* (1859), 1 S. & T. 574; 29 L. J. P. 34; 1 L. T.

194; *Simonin* (falsely called *Mallac*) v. *Mallac* (1860), 2 S. & T. 67; 29 L. J. P. 97; 2 L. T. 327; *Bond v. Bond* (1860), 2 S. & T. 93; 29 L. J. P. 143; 2 L. T. 543; *Brodie v. Brodie* (1861), 2 S. & T. 259; 30 L. J. P. 185; 4 L. T. 307; *Manning v. Manning*, L. R., 2 P. & D. 223; 40 L. J. P. 40; 24 L. T. 196; *Shaw v. Att.-Gen.* (1870), L. R., 2 P. & D. 156; 39 L. J. P. 81; 23 L. T. 322; *Wilson v. Wilson*, L. R., 3 P. & D. 435; 41 L. J. P. 74; 24 L. T. 351; *Shaw and Others v. Gould, Moore and Others* (1868), L. R., 3 H. L. 55; 37 L. J., Ch. 433; 18 L. T. 833; *Lolley's Case, Ann Sugden* (otherwise *Lolley*) v. *Lolley* (1812), 2 Russ. & Ry. 237; *Warrender v. Warrender* (1835), 2 Cl. & Fin. 488.

Domicil.
Cases on.

Domicil.

reside in this country after her desertion, could so far acquire a distinct domicile here as to render her husband amenable to the jurisdiction of the English Court. Sir Robert Phillimore held that the wife had not acquired such a domicile, and that the English Court had no jurisdiction.

Residence
only formerly
held sufficient
for divorce.

In the case of *Niboyet v. Niboyet (c)*, the facts were shortly as follows: the petitioner and respondent were married at Gibraltar in 1856, and cohabited together in Spain, France and Sweden, but never in England. In 1859, the respondent deserted the petitioner. The respondent was in the French Consular service, which he had entered in 1848. In 1862 he first came to England, where he acted as French Consul at Sunderland, which appointment he held till 1869. From 1869 to 1875 he held various appointments for his government abroad. In the latter year he returned to this country and acted as consul, first at Sunderland and afterwards at Newcastle-upon-Tyne, where he was served with the present petition in 1876. The adultery alleged against him was committed in Sunderland in 1867 and subsequent years.

The respondent appeared under protest and pleaded to the jurisdiction of the Court.

It was never in dispute that he was a domiciled Frenchman. The domicile of origin of the wife was English.

On these facts Sir Robert Phillimore held, that the Court had no jurisdiction to inquire into the charges against the respondent. His Lordship's decision was overruled in the Court of Appeal by James and Cotton, LL.JJ. (Brett, L.J., dissenting), whose decision has, as we have seen (*ante*, p. 3), been in its turn overruled, to all intents and purposes, by the decision of the Judicial Committee of the Privy Council in the case of *Le Mesurier v. Le Mesurier and Others (d)*.

(c) (1878), 4 P. D. 1; 48 L. J. P. 1; 39 L. T. 486.

(d) (1895) A. C. 517; 64 L. J., P. C. 97; 72 L. T. 873. The

The very important cases of *Harvey* (otherwise *Farnie*) v. *Farnie* (e) and *Sottomayor* (otherwise *De Barros*) v. *De Barros* (f), the former of which went up to the House of Lords, were decided about the same time as *Niboyet* v. *Niboyet*, that is, in 1878.

But though the element of domicile enters largely into the consideration of both these cases, the jurisdiction of the English Court was never questioned in either of them, and they will be found under the head of NULLITY OF MARRIAGE, to which portion of this work they properly belong.

In the next reported case, *Firebrace* v. *Firebrace* (g), Sir James Hannen held that he had no jurisdiction against a respondent domiciled in Australia, who had been temporarily resident in England, after he had left this country, in a suit for restitution of conjugal rights. But this case was decided in 1878, six years before the passing of the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), as to which see *post*, Chap. IV., p. 84. In fact, the case is only now of value for the sake of the facts on which the Court arrived at the conclusion that the

Domicil.
Nullity.

Restitution
of conjugal
rights.

effect of this decision on previous decisions is thus summed up in the head-note in the *Law Journal* report, at p. 97:—“*Brodie* v. *Brodie*, 2 Sw. & Tr. 259; *Niboyet* v. *Niboyet*, 4 P. D. 1; *Jack* v. *Jack*, 24 Sess. Cas. (2nd Series) 467; and *Hume* v. *Hume*, 24 Sess. Cas. (2nd Series) 1342, disapproved. Dicta of Lord Westbury, L. C., in *Shaw* v. *Gould*, L. R., 3 E. & I. App. 55, 85; 37 L. J., Ch. 433, 447; and in *Pitt* v. *Pitt*, 4 Macq. App. Cas., approved.” See also *Stavert* v. *Stavert*, 9 Sess. Cas. (4th Series) 529; *Shields* v. *Shields*, 4 Sess. Cas. (2nd Series) 142.

(e) (1882), 8 App. Cas. 43; 52 L. J. P. 33; 48 L. T. 273. See *Bater* v. *Bater* (otherwise *Lowe*), (1906) P. 209; 75 L. J. P. 60; 94 L. T. 835, in which *Harvey* v. *Farnie* and *Le Mesurier* v. *Le Mesurier* and *Others* were applied; and *Castrique* v. *Behrens* (1861), 30 L. J., Q. B. 163, was approved.

(f) (1877), 3 P. D. 1; 47 L. J. P. 23; 37 L. T. 415; (Queen’s Proctor intervening) (1879), 5 P. D. 94; 49 L. J. P. 1; 41 L. T. 281.

(g) (1878), 4 P. D. 63; 47 L. J. P. 41; 39 L. T. 94.

Domicil. respondent had not acquired a domicile in this country.
 Restitution of conjugal rights. These facts are too lengthy to be set out in the present edition of this work (*h*).

Dissolution. Next in order in the Reports comes the case of *Santo Teodoro v. Santo Teodoro* (*i*).

Domicil of wife. In that case an English lady consented to marry the eldest son and heir of a Neapolitan nobleman, on condition of their always having, after marriage, a residence in England, and of their residing there six months at least in each year. The marriage was celebrated in August, 1854, in England. A few months after the marriage a London residence was taken and furnished by the parties, which they occupied for six months in each year, with two or three exceptions, from 1855 to 1872. In 1872, the lady separated from her husband in consequence of his cruelty and adultery, and she continued up to the hearing to reside in their London residence.

Matrimonial home. The Court held that it had jurisdiction to dissolve the marriage, on the ground that the parties had always had a matrimonial home in England, but this was of course before the decision in *Le Mesurier v. Le Mesurier and Others*.

Husband leaving wife, and subsequently suing in Kansas Court on ground of her desertion. In the case of *Briggs v. Briggs* (*k*), the petitioner asked for the dissolution of her marriage with the respondent, on the grounds of his desertion, bigamy, and adultery. The marriage took place at Birmingham in 1862. Both the parties were domiciled English subjects. In 1868, the respondent, being in difficulties, left the country to avoid his creditors, and went to the United States. After attempting to establish himself in business at Cleveland, in Ohio; at the sight of one of his creditors he fled two thousand miles farther west, and took up his residence in

(*h*) In the course of his judgment in this case, Sir James Hannen cited (amongst others) the case of *Udny v. Udny* (1869), L. R., 1 H. L. (Sc.) 441. (*i*) (1876), 5 P. D. 79; 49 L. J. P. 20; 42 L. T. 331. (*k*) (1880), 5 P. D. 163; 49 L. J. P. 38; 28 W. R. 702.

the State of Kansas, and there, on the 9th of June, 1873, procured a divorce from his wife on the ground of her desertion. On the 25th of September in the same year he went through a ceremony of marriage with another woman, with whom he had ever since cohabited. D'ssolution.

The wife had no notice of the divorce proceedings in Kansas, the Court there having required no evidence of service of the proceedings on the respondent, beyond the oath of the husband that he had posted to his wife in England notice of his petition, and it being also proved that such notice had been published in a Kansas newspaper during three weeks.

Sir James Hannen held that the American divorce was of no effect, and pronounced a decree *nisi* for a dissolution of the marriage.

Substituting the wife for the husband as petitioner, the case of *Green v. Green and Sedgwick* (l) strongly resembles that of *Briggs v. Briggs*.

In *Turner (falsely called Thompson) v. Thompson* (m), the facts were as follows: The petitioner, a British subject domiciled in England, was married on the 7th of November, 1872, in England to the respondent, a domiciled citizen of the United States, engaged in the United States marine service. The respondent was from time to time engaged professionally, and was absent from the petitioner, and the parties cohabited at various places in the United States and elsewhere. In 1879 the petitioner presented a petition in the United States for a dissolution of the marriage on the ground of the respondent's impotence, the form of decree in the United States being a dissolution of marriage, and not, as in this country, a declaration that the marriage was null and void. After obtaining a decree in that suit, she returned to England,

Husband
domiciled in
America.
Decree of
dissolution in
American
Courts.

(l) (1893) P. 89; 62 L. J. P. 112; 68 L. T. 261.

(m) (1888), 13 P. D. 37 (reported also as *T. v. T.*, 57 L. J. P. 40; 58 L. T. 387).

Dissolution. and instituted a suit in the English Court for a decree
Nullity. declaring the marriage null and void on the same ground.
The Court, holding that the domicile of the wife was American, and that the marriage had been totally and absolutely dissolved by the decree of the American Court, dismissed the petition.

Husband
son of
naturalised
British
subject.
Question
whether
domicil
English or
Canadian.

D'Etchgoyen v. D'Etchgoyen (n) was a husband's petition for a dissolution of his marriage on the ground of his wife's adultery. The respondent appeared under protest, and filed *an act on petition* alleging that the Court had no jurisdiction on the ground that the petitioner's domicile was not English.

The petitioner was the son of French parents, and was born in France in 1854. When he was five years old he came with his parents to England, and he remained here with them for eight years. His father became naturalised as a British subject in 1874. Two years before the naturalisation took place, the petitioner, who was then eighteen years old, went to Canada, and in 1876 he purchased a farm in the province of Quebec, and carried on the business of a farmer there for six years. He voted at various elections, and he served for three years in a Canadian volunteer cavalry corps.

In 1878 he was married to the respondent in Quebec, and in 1882 he let the farm and came back with the respondent and their children to England, and for two years he resided with his father. In 1883 he obtained from the French Government "letters of relief," which exempted him from certain penalties which, as a French subject, he would have incurred by entering foreign military service without due permission. In and since 1885 he visited Canada several times on business connected with the letting of his farm, and it was stated that since 1884 he had been only seven months in England.

(n) (1888), 13 P. D. 132; 57 L. J. P. 104; 37 W. R. 64.

The respondent never went back to Canada after leaving that country in 1882. The adultery was alleged to have been committed in England during the years 1884 and 1885.

Dissolution.

Domicil of
petitioner.

Sir James Hannen held that the petitioner's domicile was English, and had never ceased to be English, and that the English Court had therefore jurisdiction to hear the petition.

In *Armytage v. Armytage (o)*, the Court held that, where the parties were resident in this country at the beginning of a suit, it had jurisdiction to grant the wife a judicial separation on the ground of her husband's cruelty, although the domicile of the parties was foreign, and although the acts of cruelty were committed abroad.

Judicial
separation.
Matrimonial
home.

In *Chetti (Venugopal) v. Chetti (Venugopal) (p)*, the petitioner (wife), who asked for a judicial separation on the ground of desertion, was an Englishwoman domiciled in England, and the respondent was a British subject—a Hindu—who was domiciled and permanently resident in India at the time of the petition, but was temporarily resident in England at the time of the marriage. The respondent denied the validity of the marriage on the ground that being a Hindu he could not marry anyone outside his own caste or who was not a Hindu by religion. The Court held that a foreigner, or a British subject domiciled abroad, cannot set up against a marriage duly contracted in England according to English law, any personal incapacity imposed by the law of his domicile (*p*).

In *Garstin v. Garstin (q)* it was held that a respondent who had appeared absolutely had thereby admitted the jurisdiction of the Court, and could not afterwards amend his appearance in order to plead to the jurisdiction. The Judge Ordinary (Lord Penzance) said: "Sir C. Cress-

Respondent
appearing
absolutely
where juris-
diction
doubtful.

(*o*) (1898) P. 178; 67 L. J. 21; 99 L. T. 885.
P. 90; 78 L. T. 680. (q) (1865), 4 S. & T. 73; 34
(p) (1909) P. 67; 78 L. J. P. L. J. P. 45.

Dissolution.

well having in *Forster v. Forster* (r) refused to allow a respondent, who had appeared absolutely, to amend her appearance and enter an appearance under protest, I feel myself bound by his opinion, though I have some doubt upon the question."

Court can raise question of jurisdiction at any time, or send papers to King's Proctor.

This rule of practice has undoubtedly been followed ever since. But it by no means follows because a respondent who has appeared absolutely is refused leave to amend his plea and appear under protest, that the Court can refuse to notice its own want of jurisdiction, when brought to its notice by the King's Proctor, or an ordinary intervener, or indeed in any other manner. Were it otherwise, parties might agree collusively to give the Court jurisdiction where no jurisdiction existed; and certain it is, whatever may be the case in an ordinary civil action, that in a *quasi* criminal proceeding like divorce affecting the *status* of the individual, no amount of agreement between parties can give the Court a jurisdiction which it does not possess, either inherently or by virtue of some statute.

Lunatics.

It was formerly held that a suit for dissolution could not be maintained against a lunatic (s).

Where a petition was presented for dissolution of the marriage, by reason of the adultery of the respondent, and an allegation having been made and supported by affidavits, that she was insane and incapable of pleading, a guardian was appointed by the Court for the purpose of raising that question on her behalf, and the issue was tried before the Court and a special jury (t).

Guardian appointed by Court.

A petition was presented by a husband for a dissolution of his marriage, by reason of the adultery of his wife; on an allegation that the respondent was insane, an issue was directed to try that question, and the jury found that on

(r) *And Berridge* (1862), 3 S. 6 L. T. 27.

& T. 144; 31 L. J. P. 185; 9 L. T. 147.

(t) *Mordaunt v. Mordaunt, Cole and Johnstone* (1870), L. R.,

(s) *Bawden v. Bawden* (1861), 2 S. & T. 417; 31 L. J. P. 94;

2 P. & D. 382; 41 L. J. P. 42; 26 L. T. 812.

the day of the service of the citation the respondent was in such a condition of mental disorder as to be unfit and unable to answer the petition and to duly instruct her attorney for her defence, and that she had ever since remained, and then still did remain, so unfit and unable; thereupon the Judge Ordinary ordered that no further proceedings should be taken in the suit until the respondent recovered her mental capacity: Held, on appeal, by the majority of the Court, that such order was right (*u*).

Lunatic.
—

But this decision was reversed on appeal to the House of Lords, where it was determined that, by the Matrimonial Causes Act, 1857, s. 31, a petitioner, upon proof of the adultery of his wife, is absolutely entitled to a decree dissolving the marriage, unless certain acts mentioned therein are proved against him. In this case, in which the wife was found by a jury to have become lunatic before the institution of the suit, and had remained in this state: Held, that such lunacy was no ground for staying the proceedings, not being within the exceptions of the above section (*x*).

Lunacy no
ground for
stay of
proceedings.

Where, in answer to a wife's petition for judicial separation, a husband appeared under protest and filed an act on petition, alleging a Scotch domicile, and immediately commenced proceedings for a divorce in the Scotch Courts, the English Court granted an injunction, restraining the proceedings in the Scotch Courts until after the hearing of the act on petition (*y*).

Jurisdiction
restraining
proceedings in
foreign
Court, 1898.

(*u*) *Mordaunt v. Mordaunt*, (1874), L. R., 2 H. L. (Sc.) 374;
Cole and Johnstone (1870), L. R., 43 L. J. P. 49; 30 L. T. 649.

2 P. & D. 109.

(*y*) *Christian v. Christian*

(1897), 67 L. J. P. 18; 78 L. T. 86 (1898).

CHAPTER II.

DISSOLUTION OF MARRIAGE.

Grounds for
dissolution.

Mat. C. Act,
1857 (20 & 21
Vict. c. 85),
s. 27.

POWER to dissolve a marriage was first given to any tribunal in this country by section 27 of the Matrimonial Causes Act, 1857 (*a*), which proceeds as follows: "It shall be lawful for any husband to present a petition to the said Court, praying that his marriage may be dissolved, on the ground that his wife has since the celebration thereof been guilty of adultery; and it shall be lawful for any wife to present a petition to the said Court, praying that her marriage may be dissolved, on the ground that since the celebration thereof her husband has been guilty of incontinuous adultery, or of bigamy with adultery, or of rape, or of sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensâ et thoro*, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards."

Divorce by
Act of Parlia-
ment before
1857.

Previous to the passing of this Act the powers of the Ecclesiastical Courts were limited to granting what was termed a divorce *a mensâ et thoro*, or from "*bed and board*," as distinguished from a divorce *a vinculo matrimonii*, or dissolution of marriage (*b*). The latter could only be obtained by means of an Act of Parliament; and even at the present day parties domiciled in Ireland can only obtain a dissolution of their marriage by this process (*c*).

Ireland at
present time.

(*a*) 20 & 21 Vict. c. 85.

(*b*) By sect. 16 of the Mat. C.
Act, 1857, "a sentence of judicial

separation" is substituted for a
divorce *a mensâ et thoro*.

(*c*) See as an example, *Hart's
Divorce Bill*, (1898) A. C. 305.

By section 22 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), "In all suits and proceedings, other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which, in the opinion of the said Court, shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained, and to the rules and orders under this Act."

As the Ecclesiastical Courts had no power to dissolve a marriage, the Legislature could not well tie the hands of the New Court by compelling it to follow their rules of practice in cases of dissolution (*d*). In every other class of matrimonial cause, however—except in so far as it has been emancipated by subsequent statutes—the Court is still compelled, whenever possible, to follow the principles and practice of these tribunals.

Non-consummation of marriage could not be pleaded in the Ecclesiastical Courts to a petition for a divorce *a mensâ et thoro* (*e*); and where there was no consummation, it was no bar to a divorce of this kind on the husband's petition (*f*), and the same has been held since the institution of the Divorce Court (*g*). But a plea that the marriage was null, on account of the husband's impotence, was held a good defence (*h*).

Antenuptial incontinence is no ground for a petition for dissolution, but it may become a relevant part of the inquiry, as where antenuptial incontinence, previously unknown to the husband, is alleged by way of reply to the defence of wilful separation (*i*).

(*d*) *Hooke v. Hooke* (1858), 4 S. & T. 236; 28 L. J. P. 29.

(*e*) *Brown v. Brown* (1842), 13 Jur. 370.

(*f*) *Patrick v. Patrick* (1810), 3 Phill. 496.

(*g*) *Waters v. Waters and Gentel* (1875), 33 L. T. 579.

(*h*) *Serrell v. Serrell and Bamford* (1862), 2 S. & T. 422; 31 L. J. P. 55.

(*i*) *Perrin v. Perrin* (1822), 1 Add. 4. See also *Sullivan v. Sullivan* (1824), 2 Add. 306, note.

Principles of the Court.

In suits other than dissolution Court bound by practice of Ecclesiastical Courts, Mat. C. Act, 1857 (20 & 21 Vict. c. 85), s. 32.

Divorce *a mensâ et thoro* in Ecclesiastical Courts.

Non-consummation no bar.

Plea of impotence.

Antenuptial incontinence. No ground for dissolution.

Principles of
the Court.

Adultery, to be a ground for a divorce, must have been committed before the date of the petition; but where a respondent and co-respondent were shown to have been guilty of acts suggestive of adultery before the date of the petition, the Court allowed the petitioner to prove adultery committed after the petition, on the ground that such evidence tended to show the true nature of the earlier acts (*k*).

Dissolution,
petition for,
four years
after decree
of judicial
separation.
Delay in filing
petition.

In *Mason v. Mason* (*l*), it was held by the Court of Appeal that a husband might present a petition for a dissolution of his marriage four years after he had obtained a decree of judicial separation, together with 50*l*. damages, on the ground of his wife's adultery with the same co-respondent, she having in the meantime continued to cohabit with the adulterer, and the husband having taken no steps to recover the damages. In this case the reasons given by the husband for the delay were want of means, and that he hoped his wife would come back and live with him.

Want of
means, &c.

Lunatics.
Committee of,
may maintain
suit.

A duly appointed committee of a person, found by inquisition to be of unsound mind, may take proceedings as petitioner, intervener, or respondent; and if no committee be appointed, the registrar will assign a guardian *ad litem* to such person for the purpose of carrying on the proceedings, under Rule 196 of the Divorce Court Rules.

Guardian
ad litem.

But this ought not to be done where there is a *bonâ fide* and substantial dispute as to the unsoundness of mind of a party to a divorce suit (*m*).

The committee of a lunatic husband may present a petition for the dissolution of his marriage (*n*).

(*k*) *Wales v. Wales and Cullen*, (1900) P. 63; 69 L. J. P. 34. P. & D. 121; 43 L. J. P. 6; 29 L. T. 251.

(*l*) (1883), 8 P. D. 21; 52 L. J. P. 27; 48 L. T. 290. See also *Green v. Green* (1873), 3 (*m*) *Fry v. Fry* (or *Routh v. Fry*) (1890), 15 P. D. 50; 59 L. J. P. 43; 62 L. T. 501.

(*n*) *Baker v. Baker* (1880), 6 P. D. 12; 49 L. J. P. 83.

As has been seen, there are seven distinct grounds on which a wife may file a petition for a dissolution of her marriage under section 27 of the Matrimonial Causes Act, 1857.

Dissolution,
grounds for.
Wife
petitioner.

1. *Incestuous Adultery*.—This is defined, by section 27, to mean “adultery committed by a husband with a woman with whom, if his wife were dead, he could not lawfully contract marriage, by reason of her being within the prohibited degrees of consanguinity or affinity” (o). Both legitimate and illegitimate relations are included in this definition (p).

Incestuous
adultery.
Definition of.

Illegitimate
as well as
legitimate
relations.

2. *Or of Bigamy with Adultery*.—By the same section bigamy is defined to mean “marriage of any person, being married, to any other person during the life of the former husband or wife, whether the second marriage shall have taken place within the dominions of Her Majesty or elsewhere.” The 9 Geo. 4, c. 31, s. 22, which now deals with the offence of bigamy, contains a proviso, that the operation of that statute shall not extend to persons marrying a second time, whose husband or wife shall have been continually absent for the seven years immediately preceding the second marriage, and shall not have been known by such person to be living within that time. The Divorce Act takes no notice of this proviso in the 9 Geo. 4, c. 31, but simply defines bigamy as above for the purposes of the Act; so it would seem that a person who is not

Bigamy—
what is.

9 Geo. 4, c. 31,
s. 22.

(o) As to what is meant by the “prohibited degrees of consanguinity or affinity,” see *Sherwood v. Ray*, 1 Moore P. C. C. 355 (notis) (1837). This has been altered by the Deceased Wife’s Sister’s Marriage Act, 1907 (7 Edw. 7, c. 47), which legalized marriage with a deceased wife’s sister—including a sister of the half-blood. See also

“Table of Kindred and Affinity” at the conclusion of Part I.

(p) *Horner v. Horner* (1799), 1 Hagg. Con. C. 352. See also *Woods v. Woods* (1840), 2 Curt. 521; *R. v. St. Giles-in-the-Fields* (1847), 11 Q. B. 173. For a case where a husband was charged with incestuous adultery with his own daughter, see *Virgo v. Virgo* (1893), 69 L. T. 460.

Dissolution,
grounds for.

guilty of bigamy within the 9 Geo. 4, by the operation of the proviso, is guilty for the purpose of dissolution of marriage.

Adultery and
bigamy must
be with same
woman.

In a suit for dissolution of marriage on the ground of bigamy with adultery, there should be proof of adultery and bigamy with the same woman (*q*).

Criminal
offence of
bigamy,
definition.

The criminal offence of bigamy is complete, although the subsequent marriage be void, on the ground of consanguinity or the like (*r*), or through the banns being fraudulently published in a fictitious name (*s*); but in the Divorce Court it is necessary to prove such a marriage as, but for the former marriage, would be valid (*t*). And the act of bigamy charged must be proved; proof of the conviction will not suffice (*u*).

Bigamy.
Proof of
conviction
not sufficient.

As to whether a husband's bigamy condoned by a wife would be revived by his subsequent marital misconduct, see *Furness v. Furness* (*x*).

Cases, as to.

Some of the cases dealing either directly or indirectly with the subject of bigamy are: *Ellam v. Ellam* (*q*), *Bonaparte v. Bonaparte* (*y*), *Snook v. Snook and Woolcott* (*Queen's Proctor showing cause*) (*z*), *Dixon v. Dixon* (*a*), *Potter v. Potter* (*b*), *Moore v. Moore* (*Queen's Proctor showing cause*) (*c*), and *Whitworth v. Whitworth and Thomasson* (*d*).

Rape.

3. *Of Rape*.—The rape must be proved; the proof

(*q*) *Horne v. Horne* (1858), 2 S. & T. 48; 27 L. J. P. 50. See also *Ellam v. Ellam* (1889), 58 L. J. P. 56; 61 L. T. 338.

(*r*) *R. v. Brawn*, 1 C. & K. 144.

(*s*) *R. v. Penson*, 5 C. & P. 412.

(*t*) *Burt v. Burt* (1860), 2 S. & T. 88; 29 L. J. P. 133; 2 L. T. 439.

(*u*) *March v. March* (1858), 28

L. J. P. 30; 1 S. & T. 550.

(*x*) (1860), 2 S. & T. 63; 29 L. J. P. 133; 2 L. T. 439.

(*y*) (1891), 65 L. T. 795.

(*z*) (1892), 67 L. T. 389.

(*a*) *Ib.* 394.

(*b*) *Ib.* 721; 1 R. 499.

(*c*) (1892) P. 382; 62 L. J. P. 10; 67 L. T. 539.

(*d*) (1893) P. 85; 62 L. J. P. 71; 68 L. T. 467.

of a conviction will not suffice. As to the evidence requisite, see "Archbold's Criminal Pleadings," tit. *Rape*. Dissolution, grounds for.

In 1884 the Court granted a decree *nisi* for dissolution of marriage to a wife whose husband had committed rape, although she herself had previously been found guilty of adultery (*e*). Rape. Marriage dissolved on ground of, at suit of wife guilty of adultery.

A wife may obtain a divorce from her husband for rape, though he has been prosecuted and convicted for an indecent assault only (*f*).

4. *Or of Sodomy.*

Sodomy.

5. *Or of Bestiality.*—For the definition of and evidence requisite for these offences, see "Archbold's Criminal Pleadings and Practice," tit. *Sodomy—Bestiality*. Bestiality.

6. *Or of Adultery coupled with such Cruelty as without adultery would have entitled her to a divorce a mensâ et thoro.*—This is one of the few instances where the decisions of the Ecclesiastical Courts are authorities for the Court for Divorce in questions of dissolution of marriage; as to what is such cruelty, see *post*, JUDICIAL SEPARATION, Chap. III., p. 61. Adultery with cruelty.

Where a wife has obtained a decree of judicial separation on the ground of her husband's cruelty, she can obtain a divorce on the ground of his subsequent adultery (*g*); and if she has obtained a decree of judicial separation, by reason of his adultery (when she might have obtained a decree of dissolution on the ground of such adultery coupled with cruelty, but has elected only to apply for judicial separation), she may afterwards institute a suit to dissolve the marriage, on the ground of his adultery committed subsequently to the decree for Judicial separation on ground of cruelty. Subsequent petition for dissolution on ground of adultery.

(*e*) *Collins v. Collins* (1884), 9 P. D. 231; 53 L. J. P. 116. *worthick v. Bosworthick*, 86 L. T. 121.

(*f*) *Coffey v. Coffey*, (1898) P. 169; 67 L. J. P. 86; 78 L. T. 796. Followed in 1902 in *Bos-* (*g*) *Bland v. Bland* (1866), L. R., 1 P. & D. 237; 35 L. J. P. 104.

Dissolution,
grounds for.

Adultery
coupled with
desertion.

judicial separation, coupled with his cruelty to her during the cohabitation (*h*).

7. *Of Adultery coupled with Desertion without reasonable excuse for Two Years or upwards.*—The Court will grant a wife a divorce on the ground of adultery and desertion, although she may have offered her husband to return to him upon certain conditions (*i*); but, in every case, the full statutory period of two years must have been completed before the filing of a petition for dissolution (*k*). As to what is desertion for two years, see *post*, Chap. III., p. 61.

47 & 48 Vict.
c. 68, s. 5.

Desertion by
failure to
comply with
order in suit
for restitu-
tion.

Suit may be
compromised.

By section 5 of the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68) (*l*), "If the respondent shall fail to comply with a decree of the Court for restitution of conjugal rights, such respondent shall thereupon be deemed to have been guilty of desertion without reasonable cause, and . . . the wife may forthwith present a petition for dissolution of her marriage." . . .

An agreement for good consideration to compromise a suit for dissolution is binding if it has not been obtained by fraud or duress (*m*).

Defences in
dissolution.

In a suit for dissolution of marriage, the defences open to a respondent or co-respondent may be divided into two

(*h*) *Green v. Green* (1873), L. R., 3 P. & D. 121; 43 L. J. P. 6; 29 L. T. 251.

(*i*) *Gibson v. Gibson* (1859), 29 L. J. P. 25. But see *Harris v. Harris and Lambert* (1862), 31 L. J. P. 6. See also *Cargill v. Cargill* (1858), 1 S. & T. 235; 27 L. J. P. 69; *Basing v. Basing* (1864), 3 S. & T. 516; 33 L. J. P. 150; 10 L. T. 756.

(*k*) *Lapington v. Lapington* (1888), 14 P. D. 21; 58 L. J. P. 26; 59 L. T. 608; *Stevenson v. Stevenson*, (1911) P. 191.

(*l*) See *post*, Chap. IV., p. 85.

(*m*) *Sterbini v. Sterbini* (1870), 39 L. J. P. 82; 22 L. T. 552; and see as to making terms of compromise an order of Court, *Smythe v. Smythe* (1887), 18 Q. B. D. 544; 56 L. J., Q. B. D. 217; 56 L. T. 197. See also as to costs of compromise, *Lancaster v. Lancaster*, (1896) P. 75; 65 L. J. P. 34; 74 L. T. 64.

As to the effect of a decree of dissolution on real estate conveyed to the husband and wife, see *Thornley v. Thornley*, (1893) 2 Chanc. 229; 62 L. J. Ch. 370; 68 L. T. 199.

classes: first, *Absolute Bars, i.e.*, such as being established to the satisfaction of the Court are a complete answer to the petition, so that the Court can exercise no discretion, but is bound to dismiss the petition; second, *Discretionary Bars, i.e.*, such as being established, leave to the Court a discretion as to the decree.

Dissolution,
grounds for.

There are but four absolute defences:—

1. Denial of facts alleged in the petition.
2. Connivance.
3. Condonation.
4. Collusion.

Absolute
defences in
dissolution,
list of.

Discretionary defences are:—

1. Adultery of petitioner.
2. Unreasonable delay in presenting or prosecuting the petition.
3. Cruelty to the other party to the marriage.
4. Desertion or wilful separation from the other party before the alleged adultery without excuse.
5. Wilful neglect or misconduct, such as to have conduced to the adultery complained of.

Dissolution,
discretionary
defences in.

The above defences are the only ones contemplated by sections 29, 30, 31 of the Divorce Act, 1857 (20 & 21 Vict. c. 85), by which three sections defences in suits for dissolution of marriage are regulated, and it therefore appears that unless one of the above defences is established the Court is bound to pronounce the decree (*n*).

20 & 21 Vict.
c. 85, ss. 29,
30, 31.

I. *Denial of the facts alleged*.—The denial may be of any one or more material *facts*, as of the adultery, the marriage, &c., &c. (*o*).

Absolute
defences in
dissolution.

In the old Ecclesiastical Courts, where a suit for adultery was brought by the husband, and the wife ap-

Former mar-
riage. Prac-
tice of Eccle-

(*n*) *Haswell v. Haswell and Sanderson* (1859), 1 S. & T. 502; 29 L. J. P. 21; 1 L. T. 69.

(*o*) *Serrell v. Serrell and Bamford* (1862), 2 S. & T. 422; 31 L. J. P. 55; 5 L. T. 691.

siastical
Courts.

peared under protest and alleged nullity or a prior marriage, the Court held that these questions must be determined before the question of adultery was gone into (*p*).

With regard to the marital offences which are to be coupled with adultery in order to ground a wife's petition for dissolution of marriage, there appears to be no other absolute defence than a simple denial.

Connivance.
In Ecclesi-
astical Courts.
What was.

II. *Connivance*.—The following cases on the subject of connivance were decided before the passing of the Divorce Act, 1857.

Ecclesiastical
Courts.
Mere
inattention.

The Ecclesiastical Courts (*q*) held that, in order to amount to a bar to relief, there must be something more than mere negligence, inattention, dulness of apprehension, or indifference (*r*).

Bad language.

Neither coarse, nor even brutal behaviour, obscene or disgusting language, nor entire disregard of appearances, alone constituted connivance (*s*).

Acqui-
escence.

It was held that *connivance*, to constitute a bar to a divorce by reason of adultery, must be corrupt (*t*). Passive connivance was as much a bar as active conspiracy, but it was necessary to show an intention that guilt should ensue (*u*); but such extreme negligence as to the conduct of the wife, and such encouragement of acquaintance and

Intention
that guilt
should ensue.

Extreme
negligence.

(*p*) *Mayhew v. Mayhew* (1812), 2 Phill. 11; *Robins v. Wolseley* (1754), 1 Lee, 616.

3 Hagg. E. R. 57; *Rix v. Rix* (1777), 3 Hagg. E. R. 74.

(*s*) *Stone v. Stone* (1844), 1 Robertson, 101.

(*q*) The decisions of these Courts are not binding on the Divorce Courts in suits for dissolution, but they are still of authority in suits for judicial separation. See Chap. III., *post*, p. 61.

(*t*) *Phillips v. Phillips* (1846), 1 Robert. 145.

(*u*) *Moorsom v. Moorsom* (1793), 3 Hagg. E. R. 107; *Harris v. Harris* (1829), 2 Hagg. E. R. 376.

(*r*) *Rogers v. Rogers* (1830),

familiar intimacy, as were likely to lead to an adulterous intercourse, were sufficient (*v*). Connivance.

Mere imprudence and error of judgment were not held to constitute connivance. In every case the honesty of the husband's intentions, not the wisdom of his conduct, was considered (*x*). Mere imprudence and error of judgment.

Facts to constitute connivance must have had a tendency to cause adultery to be committed (*y*). Condonation was often held to be meritorious, especially in a wife; but connivance was always considered to involve criminality (*z*). Where the connivance was doubtful, the presumption was always in favour of an absence of intention (*a*). Acts must have direct tendency to cause adultery.

Where the wife's adultery was proved, but the charge against the husband failed, it was held, that the introduction of his wife to a woman of loose character, the adultery of the wife not appearing to have been occasioned by it, did not bar him of relief (*b*).

It was held that connivance need not necessarily be connivance at adultery with the particular person charged (*c*); and also that if a deed of separation were so worded as to found a presumption that it might be intended to sanction adultery by the wife, that presumption must be rebutted by evidence (*d*). Connivance with adultery other than that charged.

Sir Cresswell Cresswell, the first Judge of the Divorce Court appointed after the Act of 1857, says of connivance Absolute defences in dissolution.

(*v*) *Gilpin v. Gilpin* (1804), 3 Hagg. 150. See also *Michelson v. Michelson* (1804), 3 Hagg. E. R. 147.

(*x*) *Hoare v. Hoare* (1800), 3 Hagg. 137.

(*y*) *Stone v. Stone* (1844), 1 Robertson, 101.

(*z*) *Turton v. Turton* (1830), 3 Hagg. 351.

(*a*) *Ibid.*; *Phillips v. Phillips* (1846), 1 Robert. 145; *Rogers v. Rogers* (1830), 3 Hagg. E. R. 57.

(*b*) *Harris v. Harris* (1829), 2 Hagg. E. R. 416.

(*c*) *Stone v. Stone* (1844), 3 No. of Cases, 278.

(*d*) *Barker v. Barker* (1824), 2 Add. 285.

Connivance.
Ecclesiastical
Courts.

Connivance.
Since Mat. C.
Act, 1857.

What is.

By implica-
tion from
facts of case.

Petitioner
having
divorced
respondent in
a foreign
Court.

Agreement to
live separate.

Wife con-
senting to
husband's
adultery.

Petitioner
bound by acts
of his agents.

ance: "It may be proved by express language or by inference deduced from facts and conduct" (e).

Where such a state of things exists as would in the apprehension of reasonable men result in the wife's adultery, and he does not interfere when he might do so, he is guilty of connivance (f).

A wife obtained a divorce in the American Courts, after which her husband married again. Subsequently she applied for a divorce in England. The Court held that if the husband had been guilty of bigamy or adultery she had been guilty of connivance (g).

But, where a deed of separation contained the following clause: "Major S. to allow Mrs. S. to reside where she pleases, and not to compel her to live with him again, or to go near her or molest her in any way; and Mrs. S. promises that if she does not fulfil her part of the agreement, Major S. shall have the full power of a husband over her, whatever his way of living may be." The Court held, that the concluding words should not be construed as giving the husband licence to commit adultery (h).

If a wife, though unwilling to consent that her husband should live in adultery, ultimately gives her consent for the sake of obtaining an allowance from him, she is guilty of connivance (i).

Where money was paid by a third person, *without the*

(e) *Boulting v. Boulting* (1864), 3 S. & T. 329; 33 L. J. P. 33; 9 L. T. 779.

(f) *Gipps v. Gipps and Hume* (1864), 11 H. L. Cas. 1; 33 L. J. P. 161; 10 L. T. 735. See also *Allen v. Allen and D'Arcy* (1859), 30 L. J. P. 2; *Marris v. Marris and Burke* (Queen's Proctor intervening) (1862), 2 S. & T. 530; 31 L. J. P. 69; 5 L. T. 768; *Glennie v. Glennie and Bowles* (1863), 3 S. & T.

109; 31 L. J. P. 171; 7 L. T. 696; *Walton v. Walton* (1859), 28 L. J. P. 97; *Brown v. Brown and Robey* (1869), 21 L. T. 181.

(g) *Palmer v. Palmer* (1859), 1 S. & T. 551; 29 L. J. P. 26; 2 L. T. 89.

(h) *Studdy v. Studdy* (1858), 1 S. & T. 321; 28 L. J. P. 44. See also 28 L. J. P. 105.

(i) *Ross v. Ross* (1869), L. R., 1 P. & D. 734; 38 L. J. P. 49; 20 L. T. 853.

consent or knowledge of the petitioner, to induce the co-respondent and respondent to commit adultery, the Court granted a decree *nisi* (*k*). But where the adultery was brought about by persons acting on behalf of the petitioner, though without his knowledge, the Court refused the decree and dismissed the petition (*l*).

Absolute
defences in
dissolution.

III. *Condonation* is "*forgiveness of a conjugal offence with the full knowledge of all the circumstances, and is a question of fact, not of law*" (*m*).

Condonation,
what is.
Question of
fact, not of
law.

It is a "*blotting out of the offence imputed, so as to restore the offending party to the same position he or she occupied before the offence was committed*." Mere forgiveness is not condonation; to be condonation "*it must completely restore the offending party, and must be followed by cohabitation*" (*n*).

It is such a complete obliteration of the condoned offence, that it cannot be used for any purpose whatever (unless subsequently revived), but that the party forgiven becomes *rectus et integer* (*o*). It has been laid down that condonation is a doctrine not limited to the Ecclesiastical Courts, or their successor, the Probate, Divorce and Admiralty Division of the High Court of Justice, nor is it the creation of statute, but a broad general principle of law (*p*).

A complete
obliteration.

Condonation,

In considering the question of condonation it is necessary to divide it into two parts: first, when pleaded by

when pleaded
by a wife.

(*k*) *Sugg v. Sugg and Moore* 1 S. & T. 183; 27 L. J. P. 71.
(1861), 31 L. J. P. 41.

(*n*) *Keats v. Keats and Montezuma* (1859), 1 S. & T. 334; 28 L. J. P. 57; 32 L. T. 321.

(*o*) *Anichini v. Anichini* (1839), 2 Curt. 210; followed in *Seller v. Seller* (1859), 1 S. & T. 482; 28 L. J. P. 99.

(*p*) *Williams v. Williams*, (1904) P. 145; 73 L. J. P. 31; 30 L. T. 174.

(*m*) *Peacock v. Peacock* (1858),

Absolute
defences in
dissolution.

Condonation.

the wife; second, when pleaded by the husband; since the Courts have often held condonation praiseworthy in a wife and, under exactly similar circumstances, culpable in a husband (*q*).

It is therefore a far more available defence for a wife than for a husband. Bearing in mind the definitions of condonation before mentioned, we must inquire,—

1st. What is “*the full knowledge of the circumstances*” required?

2ndly. What, when such knowledge is proved, is the “*forgiveness*” required?

What was,
in the
Ecclesiastical
Courts.

The following are some of the principal authorities cited in the *earlier* editions of this work from reports of decisions before the passing of the Divorce Act, either in the Ecclesiastical Courts or else in Parliament when dealing with Bills of Divorce (*r*).

Facility of
condonation.

A facility of condonation made the Court more attentive to the conduct of the husband (*s*). Though a mere suspicion of former condonation did not deprive the petitioner of his remedy (*t*).

Husband's
knowledge.

A knowledge of former acts of adultery with other persons was held not to be sufficient to bar the husband of his remedy (*u*).

Nevertheless, it was said by an old authority (*x*), if the party proceeding shall have had *notitiam saltem probabilem criminis commissi*, and continue cohabitation,

(*q*) *D'Aguilar v. D'Aguilar* (1794), 1 Hagg. E. R. 786; *Angle v. Angle* (1843), 1 Robert. 641; *Snow v. Snow* (1842), 2 No. of Ca. Supp. 13.

(*r*) These cases are not binding on the Court in suits for dissolution, but they are still of authority in suits for judicial separation. See Chap. III. (*post*, p. 61).

(*s*) *Timmings v. Timmings* (1792), 3 Hagg. 78.

(*t*) *Col. Clayton's Case*, Macq. H. of L. 660, Sess. 1832.

(*u*) *Hodges v. Hodges* (1795), 3 Hagg. E. R. 118. See also *Elwes v. Elwes* (1796), 1 Hagg. Cons. C. 292.

(*x*) Oughton, *Ordo Judiciorum*, tit. 214.

that is condonation; and *notitia probabilis* is, if witnesses had signified to the party that they could depose to the adultery of their own knowledge. This theory was acted upon by Dr. Lushington in 1842 (*y*).

Absolute
defences in
dissolution.
—
Condonation.

It was held that a husband was not bound to proceed against his wife upon suspicion, but that he ought to show his vigilance (*z*).

Not bound to
proceed on
suspicion.

Also, that the forgiveness which must follow a knowledge of a wife's guilt to establish the plea of condonation might be express or implied (*a*).

The kind of
forgiveness
necessary.

Where a petitioner to Parliament for a divorce had offered his wife 200*l.* a year if she would give up her adulterous connection, she remaining his wife, the House rejected the bill, although it did not appear that the offer was accepted (*b*).

Offer to
forgive.

Where a wife slept at her husband's house the night after the last act of adultery charged (of which act he was cognizant), it was held that the onus of showing that they did not sleep together on that night *lay* on the husband (*c*).

Parties re-
maining in
house to-
gether after
discovery of
wife's adul-
tery.

And where a petitioner suffered his wife to remain in his house for about three weeks after he had been apprised of her misconduct, and they dined together for three days after the disclosure, the House rejected the bill (*d*).

But mere residence without actual conjugal cohabitation was not held to amount to condonation (*e*).

Mere resi-
dence.

In almost every particular the doctrine of condonation, as applied to the wife by the Ecclesiastical Courts, differs from that applied to the husband (*f*).

By wife.

(*y*) *Dillon v. Dillon* (1842), 3 Curt. 112. (1792), 1 Hagg. E. R. 84.

(*z*) *Crewe v. Crewe* (1800), 3 Hagg. E. R. 132. (*d*) *Mr. Miller's Case*, Macq. H. of L. 628, Sess. 1821.

(*a*) *Beeby v. Beeby* (1799), 1 Hagg. E. R. 793. (*e*) See *Lord Cloncurry's Case*, Macq. H. of L. 607, Sess. 1811; *Campbell v. Campbell* (1857), 1

(*b*) *Mr. Perry's Case*, Macq. H. L. Pr. 663, Sess. 1838. Dea. & Sw. Ecc. 289.

(*c*) *Timmings v. Timmings* (1792), 1 Hagg. E. R. 84. (*f*) *Angle v. Angle* (1848), 12

Jur. 525.

Absolute
defences in
dissolution.

Condonation.
Judicial dicta
as to, in
Ecclesiastical
Courts.

When
pleaded by
husband.

Condonation
by wife may
be meri-
torious.

The following are some of the *dicta* of the Judges of the Ecclesiastical Courts on this point:—"A woman has not the same control over her husband, has not the same guard over his honour, has not the same means to enforce the observance of the matrimonial vow; his guilt is not of the same consequence to her: therefore the rule of condonation is held more laxly against the wife" (g).

"The effect of cohabitation is justly held less stringent on the wife, she is more *sub potestate*, more *inops consilii*; she may entertain more hopes of the recovery and reform of her husband" (h).

"Forgiveness on the part of the wife, especially with a large family, in the hope of reclaiming her husband, is meritorious, while a similar forgiveness on the part of the husband would be degrading and dishonourable" (i).

"Forbearance in bringing the suit" (by a wife) "may not only be excusable but meritorious, in hopes of reconciliation" (k).

"It is not, however, necessary for the wife to withdraw from cohabitation on the first or second instance of misconduct. It is legal and meritorious in her to submit to no inconsiderable degree of ill-treatment; to be as patient as possible. Such forbearance is not permitted to weaken her title to relief" (l).

"Cohabitation after the last act of cruelty, is not necessarily and universally a bar, as condonation, to a wife's suit, even though such condonation may be in one sense a voluntary cohabitation, or may not be forced or fraudulently brought about by the husband" (m).

(g) *D'Aguilar v. D'Aguilar* 1 Hagg. Con. C. 133.
(1794), 1 Hagg. E. R. 786.

(h) *Beeby v. Beeby* (1799), 1 Hagg. E. R. 793. See also *Popkins v. Popkins* (1794), 1 Hagg. 768 (notis).

(i) *Durant v. Durant* (1825), 1 Hagg. E. R. 752. See also *Snow v. Snow* (1842), 2 No. of Ca. Supp. 13. See also *D'Aguilar v. D'Aguilar* (1794), 1 Hagg. E. R. 786; *Turner v. Turner* (1854), 2 Sp. Ecc. & Ad. 201 (notis).

(k) *Ferrers v. Ferrers* (1780),

201 (notis).

The commencement of a suit for restitution by the wife, and her returning again under it to cohabitation, was held a complete condonation (n).

“*Condonation is forgiveness, with an implied condition that the injury shall not be repeated, and that the other party shall be treated with conjugal kindness; therefore on breach of the condition the right to a remedy for the former injury revives*” (o).

It was held by the old Courts, and it is still law, that a slighter offence (though not a slight offence) would revive condoned adultery (p).

Less cruelty was necessary to revive condoned adultery than to found an original suit (q).

For the offences needed not to be *ejusdem generis*, and it was held that cruelty would revive condoned adultery (r), and *vice versâ*.

But cruelty fully condoned was not revived by subsequent desertion (s), and the question whether condoned cruelty was revived by *subsequent cruelty* depended somewhat on the nature of the original cruelty (n).

Where a husband and wife separated by consent in consequence of the husband's cruelty, and the wife afterwards sued for a restitution of conjugal rights, and after decree the parties again cohabited, when the husband again renewed his acts of cruelty to the wife, who continued, however, to cohabit with him for six months, the Ecclesiastical Court held that the former cruelty was revived (t).

(n) *Evans v. Evans* (1843), 2 No. of Cas. 473. See also *Neeld v. Neeld* (1831), 4 Hagg. E. R. 268.

(o) *Durant v. Durant* (1825), 1 Hagg. E. R. 752.

(p) *Collet v. Collet*, July 14, 1840; 8 Monthly Law Magazine, 158.

(q) *Bramwell v. Bramwell* (1831), 3 Hagg. E. R. 635.

(r) *Durant v. Durant*, *supra*; *Eldred v. Eldred* (1840), 2 Curt. 376; *Worsley v. Worsley* (1730), 2 Lee, 572.

(s) *Hart v. Hart* (1855), 2 Sp. Ecc. & Ad. 193.

(t) *Wilson v. Wilson* (1849), 6 Moore, P. C. C. 484.

Absolute defences in dissolution.

Condonation.

By suit for restitution of conjugal rights.

Revival.

Implied condition.

Slighter offences will revive.

Offences *ejusdem generis*.

Absolute
defences in
dissolution.

Condonation
and revival
since Mat. C.
Act, 1857.

It must
amount to a
reinstatement
of offending
wife to her
former
position.

Must be with
knowledge of
wife's
adultery.

Presumption
of, from
continuance
of cohabita-
tion.

Doctrine of
revival, how
far applica-
ble in proceed-
ings for
dissolution of
marriage.

Revival of
adultery by sub-
sequent cruelty.
Condonation
and revival
apply to
desertion.

The following cases have been decided since the passing of the Divorce Act, 1857, and it will be seen that the principles guiding the Court are not materially altered from those which guided the older tribunals.

Sir Cresswell Cresswell defines condonation as a "blotting out of the offence imputed, so as to restore the offending party to the same position he or she occupied before the offence was committed" (*u*).

But in order to establish condonation, it is not sufficient to prove that a husband returned to cohabitation with his wife, after he had evidence of her adultery: it is necessary also to prove that he believed her to be guilty and intended to forgive her (*x*).

The wife's condonation of cruelty will not lightly be presumed from a continuation of cohabitation, after one or even several acts of cruelty (*y*). The fact that a husband sleeps in the same bed with his wife after knowledge of her adultery affords a strong presumption of condonation, but such presumption is capable of being rebutted by evidence (*z*).

The word condonation has the same meaning in the Divorce Acts as it had in the Ecclesiastical Courts, and the doctrine of revival is equally applicable to it (*a*).

So, in the Divorce Court, as in the Ecclesiastical Courts, cruelty will revive condoned adultery and *vice versâ* (*b*).

Condoned adultery may be revived by subsequent desertion, and condoned desertion by subsequent adultery (*c*).

(*u*) *Keats v. Keats and Montezuma* (1859), 1 S. & T. 334; 28 L. J. P. 57; 32 L. T., O. S. 321.

(*x*) *Ellis v. Ellis and Smith* (1865), 4 S. & T. 154; 34 L. J. P. 100; 13 L. T. 211.

(*y*) *Curtis v. Curtis* (1858), 1 S. & T. 192; 27 L. J. P. 73; affirmed, 28 L. J. P. 55.

(*z*) *Hall v. Hall*, (1891) P. 302; 60 L. J. P. 73 (C. A.),

affirming 67 L. T. 837. See also *Pitt v. Pitt*, 33 L. T. 136.

(*a*) *Dent v. Dent* (1865), 4 S. & T. 105; 34 L. J. P. 118; 13 L. T. 252.

(*b*) *Palmer v. Palmer* (1860), 2 S. & T. 61; 29 L. J. P. 124; 2 L. T. 363.

(*c*) *Blandford v. Blandford* (1883), 8 P. D. 19; 52 L. J. P. 17; 48 L. T. 238; *Cargill v.*

It was held in the Divorce Court that condoned adultery might be revived by familiarities falling short of actual adultery (*d*).

But in *Collins v. Collins* (*e*), which was an appeal from the Scotch Courts, the House of Lords held, that to obtain a divorce the petitioner must prove adultery subsequent to condonation, and no less (*f*).

Slighter acts than would have sufficed to found an original suit are sufficient to revive condoned cruelty (*g*); so harsh and degrading treatment, short of personal violence, would revive former acts of cruelty (*h*).

Subsequent threats, which satisfy the Court that further cohabitation would be attended with danger to the party threatened, but not otherwise, will revive former acts of violence (*i*).

So, in *Mytton v. Mytton* (*k*), habitual unkindness, without blows, was held to revive condoned cruelty.

In *Moore v. Moore* (Queen's Proctor showing cause(*l*)), subsequent cruelty was held to revive condoned adultery.

In *Green v. Green* subsequent adultery was held to revive condoned cruelty. The wife having sufficient

Absolute defences in dissolution.

Revival of condoned adultery by familiarities short of adultery.

Collins v. Collins. House of Lords refused to allow condoned adultery to be revived by any offence short of adultery.
Revival of condoned cruelty.

Subsequent threats.

Habitual unkindness.

Condoned adultery revived by subsequent cruelty.

Condoned cruelty revived by subsequent adultery.

Cargill (1858), 1 S. & T. 235; 27 L. J. P. 69; *Binney v. Binney* (1893), 69 L. T. 498; *Paine v. Paine*, (1903) P. 263; 73 L. J. P. 1; *Houghton v. Houghton*, (1903) P. 150; 72 L. J. P. 31; 89 L. T. 76; *Copsey v. Copsey and Erney*, (1905) P. 94; 74 L. J. P. 40; 91 L. T. 363; *Price v. Price and Brown*, (1911) P. 201; 105 L. T. 441.

(*d*) *Winscom v. Winscom and Plowden* (1864), 3 S. & T. 380; 33 L. J. P. 45; 10 L. T. 100; *Ridgway v. Ridgway* (1881), 29 W. R. 612.

(*e*) (1884), 9 App. Cas. 205.

(*f*) In the course of his judgment in this case, Lord Blackburn

cited *Blandford v. Blandford*, *supra*; *Durant v. Durant*, 1 Hagg. E. R. 761; and *Dent v. Dent* (1865), 4 S. & T. 105; 34 L. J. P. 118; 13 L. T. 252.

(*g*) *Cooke v. Cooke* (1863), 3 S. & T. 126; 32 L. J. P. 154; 8 L. T. 644; on appeal, 3 S. & T. 246.

(*h*) *Curtis v. Curtis* (1858), 1 S. & T. 192; 27 L. J. P. 73; affirmed, 28 L. J. P. 55.

(*i*) *Bostock v. Bostock* (1858), 1 S. & T. 221; 27 L. J. P. 86.

(*k*) (1886), 11 P. D. 141; 57 L. T. 92.

(*l*) (1892) P. 382; 62 L. J. P. 10; 67 L. T. 530.

Absolute
defences in
dissolution.

grounds to ask for a dissolution, on the ground of adultery coupled with cruelty, elected only to ask for judicial separation. Three years after the decree, finding that her husband was still committing adultery, she applied for a dissolution on the ground of such subsequent adultery coupled with the cruelty committed during cohabitation (*m*).

Condonation
after decree
nisi.

In *Rogers v. Rogers* (Queen's Proctor showing cause (*n*)), a petitioner obtained a decree *nisi*, and before it was made absolute permitted the respondent to have marital intercourse with her. The respondent afterwards committed adultery: Held, that his subsequent adultery revived the condoned adultery.

Where a husband condones his wife's adultery after decree *nisi*, such decree will be rescinded for all purposes, and any damages for which a verdict has been given will fall with the decree (*o*).

Express
condition
precedent.

There may be also conditional condonation—*i.e.*, condonation with not only the implied subsequent condition, but with an express condition precedent, which, until it has been satisfied, prevents the condonation operating (*p*).

Condonation
by deed.
Condition not
to plead any
offence com-
mitted before
date of deed.
No revival.

Where a husband had been guilty of cruelty, and he and his wife separated under the provisions of a deed by which it was agreed that no proceedings should be taken by either party against the other in respect of any cause of complaint which had arisen before the date of the deed, and that every offence, if any, committed by either party against the other should be considered as condoned, and

(*m*) (1873), L. R., 3 P. & D. 121; 43 L. J. P. 6; 29 L. T. 251.

(*n*) (1894) P. 161; 63 L. J. P. 97; 70 L. T. 699. In this case the Court refused to make the decree absolute, because the parties had been guilty of collusion, but intimated that the wife might file a fresh petition.

(*o*) *Hyman v. Hyman and*

Goldman (King's Proctor showing cause), (1904) P. 403; 73 L. J. P. 106; 91 L. T. 361.

(*p*) *Cooke v. Cooke* (1863), 3 S. & T. 126; 32 L. J. P. 154; 8 L. T. 644; on appeal, 3 S. & T. 246; *Newsome v. Newsome* (1871), L. R., 2 P. & D. 306; 40 L. J. P. 71; 25 L. T. 204.

that in any proceedings by either party against the other in respect of any cause of complaint which might subsequently arise, no offence committed by either party before the deed should be pleaded or be admissible in evidence, the Court of Appeal held that subsequent adultery by the husband did not revive the wife's right to complain of the cruelty committed before the deed (*q*).

Absolute
defences in
dissolution.
—

The above case of *Rose v. Rose* was distinguished in the case of *Norman v. Norman* (*r*), where the husband had committed adultery subsequent to the deed, and the Court held that this revived the cruelty; and in *Balcombe v. Balcombe* (*s*), where the husband had committed serious breaches of his obligations under the deed, and the Court held that (as he had in effect repudiated the deed) the deed should not be a bar to the right of the wife to have her marriage dissolved on grounds partly founded on the offences committed prior to the date of the deed.

Condonation of the wife's adultery was held to be no answer to the husband's claim for damages against the co-respondent (*t*).

Condonation
no answer to
claim for
damages.

But this decision was afterwards overruled by the Court of Appeal (*u*).

IV. *Collusion*, as defined by former writers, is different from that which the Divorce Act appears to contemplate. The word was formerly used in the sense of connivance

Collusion :
what was,
before Mat. C.
Act, 1857.

(*q*) *Rose v. Rose* (1883), 8 81; 99 L. T. 308.

P. D. 98; 52 L. J. P. 25; 48 L. T. 378. See also *Gooch v. Gooch*, (1893) P. 99; 62 L. J. 54 L. J. P. 93.

P. 73; 68 L. T. 462; but in all cases of condonation by deed the deed must be specially pleaded: *Dowling v. Dowling*, (1898) P. 228; 68 L. J. P. 8.

(*r*) (1908) P. 6; 77 L. J. P. 8; 98 L. T. 61.

(*s*) (1908) P. 176; 77 L. J. P. L. T. 536, approved by C. A.

(*t*) *Pomero v. Pomero and Hadley* (1884), 10 P. D. 174;

(*u*) *Bernstein v. Bernstein, Sampson and Turner*, (1892) P. 375; 62 L. J. P. 16; 67 L. T. 52; on appeal, (1893) P. 292; 63 L. J. P. 3; 69 L. T. 513; *Story v. Story and O'Connor* (1887), 12 P. D. 196; 57 L. J. P. 15; 57 L. T. 536, approved by C. A.

Absolute
defences in
dissolution.

Collusion :
what is, since
Mat. C. Act,
1857.

Bills in Par-
liament for
divorce
before 1857,
in which Bill
rejected on
ground of
collusion.

Collusion.

To establish
collusion
petitioner
had to be
party to a
fraudulent
agreement.

Must be some
agreement or

and a conspiracy between the parties to *commit the offence*; but the collusion contemplated by the statute is a conspiracy in *presenting or prosecuting the petition*, and embraces cases where the original ground of petition may not have been connived at, but where the parties subsequently agreed to use it as means for a divorce (*x*).

The following are a few cases in which, before the passing of the Divorce Act of 1857, Parliament rejected Bills for Divorce on the ground of collusion:—

Where the adultery was proved, but a bond was subsequently produced by the husband to the wife conditioned that she should not unduly oppose the divorce (*y*); where the solicitor refused to give evidence that he was not employed by the adulterer (*z*); where the wife's adultery was proved, but evidence of the husband's misconduct had been collusively suppressed (*a*); and where there was evidence of a contract or dealing between the parties that in the action of *crim. con.*, which in those days had to precede divorce proceedings, damages against the adulterer should be given to the amount of 5*l.* (*b*).

And where the wife was present at Doctors' Commons when the husband's proctor brought the witnesses there to identify her, the House held that explanation was necessary to repel the suspicion of collusion (*c*).

But the collusion, to be a bar, was required to be between the *petitioner* and either of the *respondents* (*d*).

The following pages contain, shortly, the points of the principal reported decisions on the subject of collusion since the passing of the Divorce Act, 1857:—

To establish a charge of collusion against the petitioner

(*x*) *Lloyd v. Lloyd and Chichester* (1859), 1 S. & T. 567; 30 L. J. P. 97. (b) *Mr. George's Case* (1836), Ib. 661.

(*y*) *Captain Edward's Case* (1779), Macq. H. of L. Pr. 583. (c) *Mr. Vere's Case*, 74 H. of L. Journ. 118 and 121, Sess. 1842.

(*z*) *Mr. Down's Case*, Ib. 584. (d) *Matthyssen's Div.* (1846), 78 H. of L. Journ. 851.

(a) *Mr. Cope's Case*, Ib. 593, Sess. 1801.

and the respondent, it is necessary to prove that there exists some understanding or agreement between them (e).

Where in an undefended suit for dissolution on the ground of the wife's adultery, the wife assisted in her own identification and received money from her husband's solicitor for so doing: the Court, being satisfied that there was no collusion between the petitioner and the respondent, pronounced a decree *nisi* (f).

Where a husband, before and after the institution of the suit, had frequent interviews with his wife, and gave her money not to oppose the suit, the petition was dismissed on the ground of collusion (g).

Where a third person, wishing to marry the wife, persuaded a husband to go to Scotland and live there forty days, so that his wife was enabled to get a divorce; and also promised him a sum of money not to give any information prejudicial to his wife's suit; the House of Lords held that the Scotch divorce had been obtained by collusion and was of no force or effect in England (h).

An agreement between the parties to a divorce suit to withhold any relevant evidence from the Court amounts to collusion (i).

(e) *Gethin v. Gethin* (Queen's Proctor intervening) (1861), 31 L. J. P. 43.

(f) *Harris v. Harris and Lambert* (1862), 31 L. J. P. 6. This is now done very frequently, only, in every case where a respondent assists a petitioner's solicitor, petitioner's counsel should take care to open the fact, so that the Court may judge of the *bona fides* of the transaction. Otherwise there is always a risk of the intervention of the King's Proctor, on the ground of "material facts not brought to the knowledge of the Court."

(g) *Barnes v. Barnes and Grimwade* (Queen's Proctor in-

tervening) (1867), L. R., 1 P. & D. 505; 37 L. J. P. 4; 17 L. T. 286.

(h) *Shaw and Others v. Gould, Moore and Others* (1868), L. R., 3 H. L. 55; 37 L. J., Ch. 433; 18 L. T. 833. See also *Bonaparte v. Bonaparte (otherwise Megone)*, (1892) P. 402; 62 L. J. P. 1; 67 L. T. 531.

(i) *Bacon v. Bacon* (1877), 25 W. R. 560; *Hunt v. Hunt and Wright* (1877), 47 L. J. P. 22; 39 L. T. 45. See also *Butler v. Butler*; *Butler v. Butler and Burnham* (Queen's Proctor intervening) (1890), 15 P. D. 66; 59 L. J. P. 25; 62 L. T. 344.

Absolute defences in dissolution.

Collusion.

understanding between the parties.

Money paid to one of the parties to aid in identification.

Husband asking wife not to oppose.

Collusive residence in Scotland for purposes of divorce.

Agreement to withhold evidence.

Absolute
defences in
dissolution.

Collusion.

Agreement to
commit
adultery.

Irregularities
committed by
solicitor.

Petitioner
condoning
adultery after
decree *nisi*.

Collusion to
disguise such
condonation.

Where a husband committed adultery by agreement with his wife, and supplied the evidence against himself, in order that she might get a divorce, the Court dismissed the wife's petition on the ground of collusion (*k*).

Where the solicitors for the petitioner and respondent conducted the proceedings in a suit for dissolution of marriage, in such a way as to give rise to a reasonable suspicion of collusion, but it appeared that neither of the parties to the suit had been implicated in the irregularities of their solicitors, the Court held that collusion had not been established (*l*).

Where a wife obtained a decree *nisi* for dissolution on the ground of adultery, which she subsequently condoned, and collusively agreed with her husband to conceal from the Court the fact of such condonation: held, on the intervention of the Queen's Proctor, that the decree must be rescinded and the petition dismissed; but that there was nothing to prevent her from filing a fresh petition alleging revival of the original misconduct by the subsequent adultery. This she did, and obtained a decree (*m*).

In *Churchward v. Churchward and Holliday* (Queen's Proctor intervening (*n*)), the respondent left the petitioner and went to live in adultery with the co-respondent, whom she desired to marry. As she was possessed of independent means, the petitioner declined to take proceedings for a divorce until she had made a settlement in favour of the child of the marriage. This she agreed to do, and also to deposit 100*l.* as security for costs, whereupon the petitioner filed a petition for a dissolution of the marriage. At the hearing, his counsel brought the above facts to the knowledge of the Court, and the

(*k*) *Todd v. Todd* (1866),
L. R., 1 P. & D. 121; 35 L. J. P.
34; 13 L. T. 759.

(*l*) *Cox v. Cox* (1861), 2 S. &
T. 306; 30 L. J. P. 255; 4 L. T.
450.

(*m*) *Rogers v. Rogers* (Queen's
Proctor showing cause), (1894)
P. 161; 63 L. J. P. 97; 70 L. T.
699.

(*n*) (1895) P. 7; 64 L. J. P.
18; 71 L. T. 782.

papers were ordered to be sent to the Queen's Proctor that the question of collusion might be duly argued. Subsequently the Court held that the above agreement amounted to collusion, but intimated that, as there had been no concealment, the petitioner would not be debarred from filing a fresh petition. The Court further held, that *collusion* bears the same meaning in section 30 of the Matrimonial Causes Act, 1857, and in both parts of section 7 of the Matrimonial Causes Act, 1860 (*o*).

Absolute
defences in
dissolution.

Collusion.

By section 31 of the Matrimonial Causes Act, 1857, " . . . the Court shall not be bound to pronounce such decree " (*i.e.*, of dissolution of marriage) " if it shall find that the petitioner has during the marriage been guilty of adultery, or if the petitioner shall, in the opinion of the Court, have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party, before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery."

Discretionary
defences in
dissolution.

What are,
under Mat. C.
Act, 1857,
s. 31.

I. *Adultery*. This means adultery committed since the marriage. Only circumstances which have occurred since the marriage can influence the discretion of the Court (*p*).

Adultery:
to be a bar
must be com-
mitted during
marriage.

It is now settled that the discretion, to be exercised under the 31st section, must be a regulated discretion, and not a free option subordinated to no rules. It cannot be exercised unless there are special circumstances or special features placing the adultery in some category capable of distinct statement and recognition (*q*).

Discretion of
Court must be
a regulated
discretion.

(*o*) See also on the subject of "Collusion," *Bell v. Bell* (Queen's Proctor intervening) (1889), 58 L. J. P. 54.

v. Mawford (1866), 14 W. R. 516.

(*p*) *Allen v. Allen* (1859), 28 L. J. P. 81. See also *Mawford*

(*q*) *Morgan v. Morgan and Porter* (1869), L. R., 1 P. & D. 644; 38 L. J. P. 41; 20 L. T. 588. See also *Stoker v. Stoker*,

Discretionary
defences in
dissolution.

Adultery of
petitioner.

The whole question of the discretion of the Court under section 1 has been reconsidered in two recent cases—*Constantinidi v. Constantinidi and Lance* (1903), and *Wyke v. Wyke* (1904) (*r*). Since these decisions a good many of the cases cited in the following pages are no longer authorities on the point; but as the question has not yet come before the Court of Appeal, it would not be advisable to omit them.

In what cases
discretion of
Court may be
exercised.

There appear to be three classes of cases in which the discretion of the Court may be fitly exercised in favour of a petitioner who has been guilty of adultery.

Ignorance of
fact.

1st. Where the adultery is committed in ignorance of fact: as where a husband, believing that his wife (who had eloped from him and was living in adultery) was dead, married another woman (*s*). Or a wife, deserted by her husband, marries again under the erroneous belief that he is dead (*t*).

Adultery of
petitioner.

Committed in
ignorance of
law;

Or, in ignorance of law, as where a petitioner, after a decree *nisi* in a suit for dissolution of his marriage, married again before it was made absolute, in the *bonâ fide* belief that his marriage was already dissolved by the decree *nisi* (*u*).

In a later case a wife married again after a decree *nisi*, under a similar misapprehension as to the law, and cohabited with her second husband until his death. She then discovered her true position, and returned to her husband for a year, when she again left him on account of

*Skidmore and Murray; and
Stoker v. Stoker* (1889), 14 P. D.
60; 58 L. J. P. 40; 60 L. T.
400.

(*r*) *Post*, pp. 52, 53.

(*s*) *Joseph v. Joseph and
Wentzell* (1865), 34 L. J. P.
96. See also *Freegard v. Free-
gard, Cowper and Lucas* (1883),
3 P. D. 186; 52 L. J. P. 100.

(*t*) *Potter v. Potter* (1893),
67 L. T. 721.

(*u*) *Noble v. Noble and God-
man* (1869), L. R., 1 P. & D.
691; 38 L. J. P. 52; 20 L. T.
1016. See also *Styles v. Styles
and Jackson* (1890), 62 L. T. 613.
See also *Snook v. Snook and
Woolacott* (Queen's Proctor
showing cause) (1892), 67 L. T.
339.

his cruelty. She then applied to have the decree made absolute, and laid all the facts before the Queen's Proctor. The Court, believing that she had acted in the *bonâ fide* belief that her marriage was dissolved, made the decree absolute (*x*).

Discretionary
defences in
dissolution.

Adultery of
petitioner,

A husband and wife signed a paper to the effect that they agreed to separate, and that each was to be at liberty to marry again. The husband, an ignorant man, went through the form of marriage with another person, believing this document to be legal; but as soon as he discovered his mistake separated at once from the woman with whom he was cohabiting. The Court granted him a divorce (*y*).

2nd. Where it is committed in consequence of the violence and threats of the husband.

Where a husband had been guilty of adultery and cruelty, and also had, by threats and by personal violence, coerced his wife into leading a life of prostitution, and had lived upon the money she obtained, the Court being satisfied that the wife had been coerced into this life, granted her a decree *nisi* (*z*).

committed in
consequence
of violence
and threats;

3rd. When committed by petitioner to the knowledge of respondent, and by him or her long since *pardoned* and *condoned* (*a*).

committed
with respon-
dent's know-
ledge and
condoned.

In *Goode v. Goode and Hamson* (*b*), however, it was distinctly laid down that the Court might refuse a decree where the petitioner had been guilty of adultery, although

(*x*) *Moore v. Moore* (Queen's Proctor showing cause), (1892) P. 332; 62 L. J. P. 10; 67 L. T. 530.

(*y*) *Whitworth v. Whitworth and Thomasson*, (1893) P. 85; 62 L. J. P. 71; 68 L. T. 467.

(*z*) *Coleman v. Coleman* (1866), L. R., 1 P. & D. 81; 35 L. J. P. 37; 13 L. T. 684.

(*a*) *Anichini v. Anichini* (1839), 2 Curt. 210, followed in *Seller v. Seller* (1859), 1 S. & T. 482; 28 L. J. P. 99; which was, however, not a suit for dissolution, but a suit for judicial separation, brought by a wife.

(*b*) (1861), 2 S. & T. 253; 30 L. J. P. 105; 4 L. T. 122.

Discretionary
defences in
dissolution.

Adultery.

Rose v. Rose;
opinion of
Jessel, M.R.

Condoned
adultery with
wife's sister.

Adultery of
petitioner
condoned by
respondent.
Practically no
answer to
counter-
charge at
present day.

Petitioner's
adultery:
decree in
spite of.

Before or
after adultery
complained
of, distinction

such adultery had been condoned; and this rule was acted on, even where the petitioner had been proved guilty of a single act of adultery only (c).

In *Rose v. Rose* (d), Jessel, M.R., expressed the opinion that it must be considered an open point whether adultery by a husband, condoned by his wife, was necessarily a bar to his obtaining a divorce on account of her adultery.

But in *Stoker v. Stoker* (e), where the above case was cited as an authority, the Court refused to grant a decree where the petitioner had been guilty of adultery with his wife's sister, but which had been condoned by his wife.

In *Story v. Story* (f), the petitioner had committed adultery with a domestic servant five years before he petitioned for a dissolution of his marriage. This adultery had been condoned by his wife, who lived with him up to the date of the petition. The Court dismissed his petition.

A husband obtained a decree *nisi* by reason of his wife's adultery, which was rescinded by reason of his cruelty and adultery. The parties lived together again, and he committed other acts of cruelty, and also rape. The wife then filed a petition for dissolution, and obtained a decree (g).

The House of Lords seems formerly to have recognized a distinction between adultery committed by a petitioner prior to that complained of and adultery committed sub-

(c) *McCord* or *McLord* v. *McCord* or *McLord*, *Ogle and Coxon* (1875), L. R., 3 P. & D. 237; 44 L. J. P. 38; 33 L. T. 264; followed in *Boucher v. Boucher and Judd* (1892), 67 L. T. 790. See also *Grosvenor v. Grosvenor* (1885), 34 W. R. 140.

(d) (1883), 8 P. D. 98; 52 L. J. P. 25; 48 L. T. 378.

(e) *Skidmore and Murray*; and *Stoker v. Stoker* (1889), 14 P. D.

60; 58 L. J. P. 40; 60 L. T. 400.

(f) *Story v. Story and O'Connor* (1887), 12 P. D. 196; 57 L. J. P. 15; 57 L. T. 536. See also *Barnes v. Barnes and Beaumont* (1868), L. R., 1 P. & D. 572; 38 L. J. P. 10; 19 L. T. 526.

(g) *Collins v. Collins* (1884), 9 P. D. 231; 53 L. J. P. 116.

sequent; and to have rejected evidence of the petitioner's adultery, if it had been committed subsequent to that complained of.

This distinction has not, however, been followed by the Divorce Court (*h*).

Where, at the hearing for dissolution, the petitioner confessed that on one occasion, during a temporary separation from the respondent, he had been guilty of an act of adultery, the Court refused a decree (*i*).

And where on a husband's petition for dissolution the jury found that he had also been guilty of adultery, but long antecedent to that charged against his wife, and unknown to her until after the filing of the petition, the Court refused a decree (*k*).

A petitioner, having established his wife's adultery, was found guilty by the jury of adultery. Afterwards he presented a fresh petition, alleging subsequent adultery with other co-respondents, whereupon the Queen's Proctor intervened. The Queen's Proctor's pleas were tried before a jury, who acquitted the petitioner of the act of adultery found against him in the first suit, and the Court granted him a decree *nisi* (*l*).

A husband who had treated his wife with great cruelty finally deserted her and went to live with another woman. More than seven years after the desertion the wife, having heard nothing of her husband, but without inquiry, went to live with another man, and continued to do so long after it came to her knowledge that her husband was alive.

Discretionary defences in dissolution.

Adultery. —
in former times, not followed in Divorce Court; single act of, decree refused.

Petitioner's adultery bar to relief almost invariably.

Contradictory verdicts, decree granted in spite of petitioner's adultery. Discretion of Court. Wife guilty of adultery.

1897.

Wife guilty of adultery; decree for dissolution on her petition notwithstanding.

(*h*) *Lautour v. Lautour* (1864), 10 H. L. Cas. 685; 33 L. J. P. 89; 10 L. T. 198.

(*i*) *Clarke v. Clarke and Clarke* (1865), 34 L. J. P. 94, distinguished in *Wain v. Wain and Eve* (King's Proctor showing cause) (1909), 101 L. T. 815. See also *Evans v. Evans and Elford*, (1906) P. 125; 75 L. J.

P. 27; 94 L. T. 616.

(*k*) *Morgan v. Morgan and Porter* (1869), L. R., 1 P. & D. 644; 38 L. J. P. 41; 20 L. T. 588.

(*l*) *Conradi v. Conradi, Worrell and Way* (Queen's Proctor intervening) (1868), L. R., 1 P. & D. 514; 37 L. J. P. 55; 18 L. T. 659.

Discretionary
defences in
dissolution.
—

Subsequently, and after the wife had ceased to live in adultery, the husband was convicted under the Criminal Law Amendment Act, 1885, of an aggravated offence on a young girl. The Court, under the circumstances, granted the wife a decree *nisi* (*m*).

Adultery of
petitioner.
1900.

This case was followed in 1900, in *Burdon v. Burdon* (Queen's Proctor showing cause) (*n*), where the Court granted a divorce to a wife guilty of adultery, her adultery having been conducted to by the cruelty, threats, and general misconduct of her husband.

In the year 1903, the then President (Sir F. H. Jeune) laid down the following two propositions:—

1903.

(1) There is now no specific limitation to the discretion of the Court, and the category of cases for its exercise is not a fixed one. Whilst the discretion is judicial and not arbitrary, the class of cases for its exercise may be from time to time extended. The discretion cannot on principles of justice be exercised in favour of a petitioner whose guilt has in any serious degree contributed to the misconduct of the respondent; nor is a respondent to be allowed to evade the consequences of misconduct, by alleging misconduct of the petitioner for which such respondent has been in any serious degree responsible.

(2) A wife who leaves her husband because she has transferred her affections to another man, and whose husband correctly assumes this to be so, is in a serious degree responsible for the subsequent misconduct of the husband (*o*).

(*m*) *Symons v. Symons* (Queen's Proctor intervening), (1897) P. 167; 66 L. J. P. 81; 77 L. T. 142; and for a case in which a decree *nisi* was granted to a husband convicted of an aggravated assault, see *Sergeant v. Sergeant and Weaver* (1891), 64 L. T. 236.

(*n*) (1901) P. 52; 69 L. J. P. 118.

(*o*) *Constantinidi v. Constantinidi and Lance*, (1903) P. 246; 72 L. J. P. 82; 89 L. T. 340. *Symons v. Symons* (Queen's Proctor intervening), *supra*, followed.

The above is taken from the Law Journal Reports; the following is the head-note of the same case, as reported in the Law Reports:—

Discretionary
defences in
dissolution.

Adultery of
petitioner.

“In a husband’s suit for dissolution of marriage, upon findings of fact, that the petitioner and respondent had both committed adultery, the Court, finding as a further fact that the adultery of the petitioner had not conduced to the adultery of the respondent, exercised in favour of the petitioner the discretion conferred by the Matrimonial Causes Act, 1857, s. 31, and pronounced a decree *nisi* dissolving the marriage.

“Although the discretion conferred by section 31 is a judicial and not an arbitrary discretion, the causes for and the circumstances under which the Court may exercise its discretion in favour of a guilty petitioner are to be taken in combination and according to their several degrees of force; and the list of such causes is not a closed book, but may be extended as occasion arises” (*p*).

But in order that the Court should exercise its discretion, 1904.
it is not enough that the misconduct of the petitioner was more or less pardonable or capable of excuse, but the Court must find as a fact that the petitioner’s misconduct 1910.
was caused directly by the matrimonial offence, or offences, of the respondent (*q*).

(*p*) *Constantinidi v. Constantinidi and Lance*, (1903) P. 246; 72 L. J. P. 82; 89 L. T. 340; followed in *Coombs v. Coombs* (1904), 73 L. J. P. 23; but relief will not be granted in any case where the party seeking such relief has suppressed the fact of his or her adultery, and it has come to the knowledge of the Court in some other way, *Roche v. Roche* (King’s Proctor showing cause), (1905) P. 142; 74 L. J. P. 50; 92 L. T. 668.

(*q*) *Wyke v. Wyke* (King’s Proctor showing cause), (1904) P. 149; 73 L. J. P. 38; 90 L. T. 172. See also *Shaw v. Shaw* (1904), 20 T. L. R. 795; *Hynes v. Hynes*, *Ib.* 781; *Pegg v. Pegg*, *Ib.* 353; *Hunter v. Hunter* (King’s Proctor showing cause), (1905) P. 217; *Pretty v. Pretty* (King’s Proctor showing cause), (1911) P. 83; 104 L. T. 79; *Bullock v. Bullock*, 103 L. T. R. 847.

Discretionary
defences in
dissolution.

1900.
Petitioner
guilty of
cruelty.

Where a respondent has been found guilty of adultery and the petitioner guilty of cruelty, the Court may exercise its discretion in favour of the petitioner, provided his cruelty has not in any way conduced to the wife's adultery. Such at least is the effect of the decisions of the House of Lords before the Act of 1857, and the framers of that Act seem to have had those decisions in view in drafting section 31.

There may, however, be cases where the cruelty is of so violent and unprovoked a character that the Court will refuse a divorce, though it has in no way conduced to the adultery of the respondent.

Although it is usual in such cases to put the petitioner on terms when the Court grants him relief, there is no general rule as to what such terms should be. The Court will be guided by the circumstances of each case in deciding what order it will make (*r*).

1905.

In 1905, where a divorce was granted to a husband judicially separated from his wife on the ground of his cruelty, the Court ordered him to secure 1*l.* a week to his wife *dum sola et casta vixerit* (*s*).

“Unreason-
able delay,”
what is,
under
section 31.

View of
Ecclesiastical
Courts.

II. *Unreasonable Delay*.—“Or if the petitioner shall, in the opinion of the Court, have been guilty of unreasonable delay in presenting or prosecuting such petition.”

The view taken by the Ecclesiastical Courts on this point was thus expressed by Lord Stowell: “. . . It” (the Court) “will be indisposed to relieve a party, who

(*r*) *Pryor v. Pryor, Cowie and Macdonald*, (1900) P. 157; 69 L. J. P. 99. See also *Lloyd v. Lloyd* (1901), 84 L. T. 728. The notes of cases relating to the exercise of its discretion under sect. 31 have undoubtedly been given at greater length than is quite consistent with the plan of the present edition of this work.

But the matter is of no small importance, both to parties and to the practitioners who have to advise them, and the whole question is still involved in a certain amount of uncertainty.

(*s*) *Squire v. Squire and O'Callaghan*, (1905) P. 4; 74 L. J. P. 1; 92 L. T. 472.

appears to have slumbered in sufficient comfort. . . . It will be inclined to infer either an insincerity in the complaint, or an acquiescence in the injury, whether real or supposed, or a condonation of it" (t). Discretionary defences in dissolution.

And speaking on the same point since the institution of the Divorce Court, Sir Cresswell Cresswell says: "Delay is not of itself a bar to the suit. But it is a most material matter, which, unexplained, would lead the Court to conclusions fatal to the petitioner's relief" (u). Decision of Court of Appeal.
Dictum of Sir Cresswell Cresswell.

If there has been apparently unreasonable delay in taking proceedings, some sufficient reason for it must be given (x); but the Court will not dismiss a petition where a sufficient explanation of the delay is given (y). Some explanation of delay necessary.

Where a petitioner took no proceedings against her husband for incestuous adultery with her own sister, on account of her mother's anxiety to avoid a public scandal, until after the death of the latter, the Court held that a delay of eighteen years was not unreasonable (z). "Unreasonable delay."
Sufficient explanation: what is.

Delay may be not unreasonable if it proceeds from the petitioner's misapprehension of the law (a); and this reason is very frequently given by petitioners. Misapprehension of the law.

Want of means was always considered by Parliament a sufficient excuse for delay in presenting a bill for divorce, and this rule has ever since been acted upon in the Divorce Court (b). Want of means sufficient excuse for delay.

(t) *Mortimer v. Mortimer* (1820), 2 Hagg. Con. C. 310, at p. 313.

(u) *Boulting v. Boulting* (1864), 3 S. & T. 329; 33 L. J. P. 33; 9 L. T. 779. See also *Pellew v. Pellew and Berkeley* (1859), 1 S. & T. 553; 29 L. J. P. 44; 2 L. T. 89.

(x) *Nicholson v. Nicholson* (1873), L. R., 3 P. & D. 53; 29 L. T. 108.

(y) *Wilson v. Wilson* (1872), L. R., 2 P. & D. 435.

(z) *Newman v. Newman* (1870), L. R., 2 P. & D. 57; 39 L. J. P. 36; 22 L. T. 552.

(a) *Tollemache v. Tollemache* (1859), 1 S. & T. 557; 30 L. J. P. 113; 2 L. T. 87.

(b) See *Harrison v. Harrison* (1864), 3 S. & T. 362; 33 L. J. P. 44; 10 L. T. 138; *Mason v. Mason* (1883), 8 P. D. 21; 52 L. J. P. 27; 48 L. T. 290; *Short v. Short and Bolwell* (1874), L. R., 3 P. & D. 193.

Discretionary
defences in
dissolution.

Unreasonable
delay,
what is.

Insufficient
explanation.

But where a husband, who was a coal hauler by trade, delayed taking proceedings for about fourteen years after he had discovered his wife's adultery, and it appeared he was possessed of 600*l.*, besides other property, the Court dismissed the petition on the ground of "*unreasonable delay*" (*c*).

In *Beauclerk v. Beauclerk* (*d*) the husband and wife married in 1858. In 1870 they separated under a deed, and had never since cohabited, though only a temporary separation was contemplated. The husband committed adultery, but the wife was advised she could not, in the face of the deed, petition for dissolution on the grounds of adultery and desertion. In 1890 she petitioned for dissolution on the grounds of adultery and cruelty; but the Court held that the cruelty was not established. On appeal, the question of cruelty was not argued, the Court of Appeal holding that the petitioner had been guilty of unreasonable delay. In 1894 the wife petitioned for restitution of conjugal rights, and obtained an order against her husband, which he did not obey. She then petitioned for a dissolution of her marriage under the provisions of section 5 of the Matrimonial Causes Act, 1884, on the ground of adultery committed by the respondent subsequently to the order for restitution. The Court held that as, in consequence of the deed, she could not charge until after the proceedings for restitution of conjugal rights, she had not been guilty of unreasonable delay.

Alleged by
King's
Proctor.

Where "*unreasonable delay*" was alleged by the Queen's Proctor, the jury were asked to say whether the petitioner knew, or had reason to believe, that the respondent had been guilty of adultery two years or more before presenting his petition (*e*).

(*c*) *Faulkes v. Faulkes and
Stanton* (1891), 64 L. T. 834.
See also *Binney v. Binney* (1893),
69 L. T. 498.

(*d*) (1891) P. 189; 60 L. J.
P. 20; 64 L. T. 35; (1895) P.
220; 64 L. J. P. 102.
(*e*) *Brougham v. Brougham*

Where a husband charged adultery committed many years before, the fact that the wife was insane, and had been in a lunatic asylum for many years, and that the husband had been expecting release from her death, was held a sufficient answer to a plea of unreasonable delay (*f*).

Discretionary
defences in
dissolution.

—

III. *Cruelty*.—"Or if the petitioner shall, in the opinion of the Court, have been guilty of CRUELTY towards the other party to the marriage."

"Cruelty,"
what is.

As to what is cruelty, see *post*, Chap. III., JUDICIAL SEPARATION.

IV. *Desertion*.—"Or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse."

"Desertion,"
what is;
under
sect. 31.

Desertion, when pleaded in bar, need not be desertion for two years, or for any specific period; in other respects as to what is desertion, see *post*, Chap. III., JUDICIAL SEPARATION.

V. *Neglect or Misconduct*.—"Or of such wilful neglect or misconduct as has conduced to the adultery."

Neglect or
misconduct.

Upon this subject, Sir Cresswell Cresswell says: "It must not be supposed that a husband can neglect and throw aside his wife, and afterwards if she is unfaithful to him, obtain a divorce on account of her infidelity" (*g*).

The misconduct conducing to adultery intended by Matrimonial Causes Act, 1857, must be misconduct after marriage (*h*).

It is not mere carelessness (*i*).

Not mere
carelessness.

(Queen's Proctor intervening), *Smith* (1864), 3 S. & T. 493; 33 (1895) P. 288; 64 L. J. P. 125. L. J. P. 84; 10 L. T. 309.

(*f*) *Johnson v. Johnson* (by her guardian *ad litem*), (1901) P. 193; 70 L. J. P. 44; 84 L. T. 725. (*h*) *Allen v. Allen* (1859), 28 L. J. P. 81.

(*i*) *Dering v. Dering and Blakeley* (Queen's Proctor and others intervening) (1868), L. R.,

(*g*) *Jeffreys v. Jeffreys and*

Discretionary
defences in
dissolution.

“Neglect or
misconduct,”
what is;

must conduce
to respon-
dent's fall
from virtue.

Husband
having
reasonable
ground for
going away
from home.

Husband
allowing wife
to receive
money, &c.,
from co-
respondent.

“Neglect or
misconduct,”
what is;

“Conduct
conducing to
adultery.”

Petitioner
exposing wife
to temptation.

It must be wilful neglect or misconduct, which has directly conduced to the respondent's fall from virtue (*k*).

Felony, committed by a husband, resulting in a long term of imprisonment, during which time his wife commits adultery, is not wilful misconduct within the meaning of the Act (*l*).

Neither is it such wilful misconduct where a husband leaves his home with the *bonâ fide* intention of improving his position, although his absence may be the immediate cause of his wife committing adultery (*m*).

Where a husband allowed the co-respondent to visit frequently at his house during his absence, to send provisions into his house and to make his wife an allowance of 1*l.* a week, and had sent his wife to borrow money of him, and allowed him to escort her to London (*n*); where a husband had been in the habit of going with his wife and the co-respondent to places of amusement, and of allowing her to dance frequently with the co-respondent there, and then leaving her in the care of the co-respondent (*o*); and where a husband, having married a woman of loose character, in a short time separated himself from her without reasonable cause, and induced her to reside away from her friends in a place where she was especially liable to temptation (*p*); the Court held that they had been guilty of misconduct which conduced to adultery.

1 P. & D. 531; 37 L. J. P. 52;
19 L. T. 48. See also *Badcock*
v. Badcock and Chamberlain
(1858), 1 S. & T. 188; 31 L. T.
268.

(*k*) *St. Paul v. St. Paul and*
Farquhar (Queen's Proctor
intervening) (1869), L. R., 1 P.
& D. 739; 21 L. T. 108; but see
Millard v. Millard and Bastone
(1898), 78 L. T. 471.

(*l*) *Cunnington v. Cunnington*
and Noble (1859), 1 S. & T. 475;
28 L. J. P. 101.

(*m*) *Davies v. Davies and*
Hughes (1863), 3 S. & T. 221;
32 L. J. P. 111; 8 L. T. 703.

(*n*) *Brown v. Brown and*
Robey (1869), 21 L. T. 181.

(*o*) *Barnes v. Barnes and*
Grimwade (Queen's Proctor
intervening) (1867), L. R., 1 P.
& D. 505; 37 L. J. P. 4; 17 L. T.
286.

(*p*) *Baylis v. Baylis, Teevan*
and Cooper (1867), L. R., 1 P.
& D. 395; 36 L. J. P. 89; 6
L. T. 613. See also *Groves v.*

Tacit acquiescence by a husband may amount to such wilful neglect and misconduct as has conduced to the wife's adultery (*q*).

It seems that the conviction of a wife for an offence against the criminal law is no justification for refusing further cohabitation with her, and that, if such refusal conduce to her adultery, the Court will not grant her husband a dissolution of his marriage (*r*).

Where the wife's agent, *without her authority*, induced the husband to commit adultery, she was held guilty of conduct conducing to adultery (*s*).

Where a husband left his wife because she had run him into debt, and she subsequently formed an adulterous intercourse with the co-respondent, and continued to cohabit with him for about eleven years, the husband in the meantime neither contributing anything to her support nor troubling about her at all (*t*); and where a husband who made his wife an allowance through a third person would not see her, and wrote that he would not inquire into her mode of life, and she must not inquire into his (*u*); the Court held in both cases that they were guilty of neglect and misconduct conducing to adultery.

Discretionary defences in dissolution.

Neglect or misconduct.

Conviction of wife no excuse.

1889.

Wife's agent inducing husband to commit adultery.

1890.

Husband leaving wife because she ran him into debt and making her no allowance.

1890.

Making wife allowance, but refusing to see her or trouble about her mode of life.

Groves and Tompson (1859), 28 L. J. P. 108; *Hawkins v.*

Hawkins and Hope (1885), 10 P. D. 177; 54 L. J. P. 94.

(*q*) *Robinson v. Robinson and Dearden*, (1903) P. 155; 72 L. J. P. 63; 89 L. T. 74.

(*r*) *Williamson v. Williamson and Bates* (1882), 7 P. D. 76; 51 L. J. P. 54; 46 L. T. 920.

(*s*) *Bell v. Bell* (Queen's Proctor intervening) (1889), 58 L. J. P. 54; *Gower v. Gower*, *Pearson, Hill and Bunn* (1872), L. R., 2 P. & D. 428; 41 L. J. P. 49; 27 L. T. 43; and *Picken v. Picken*

and *Simmonds* (1864), 34 L. J. P. 22, followed.

(*t*) *Starbuck v. Starbuck and Oliver* (1889), 59 L. J. P. 20; 61 L. T. 876.

(*u*) *Lander v. Lander, Temple, Fox and Fox* (1890), 63 L. T. 257. In the above case the husband ultimately (1891) obtained a divorce, but the Court refused to make the decree absolute until he had made provision for his wife's maintenance, and refused to order the insertion of a *dum sola et casta* clause into such order, (1891) P. 161; 60 L. J. P. 65; 64 L. T. 120.

Discretionary
defences in
dissolution.

—
Neglect or
misconduct.

Wife refusing
marital inter-
course to
husband.
1896.

Husband in
service, away
for long
period with
his master.

Lunacy of
respondent.

Where a wife refused to submit to marital intercourse, it was held that her conduct had conduced to the adultery of her husband (*x*).

In *Parry v. Parry* (*y*), the Court, taking all the circumstances into consideration, notwithstanding an adverse verdict of the jury, pronounced a decree *nisi*, but directed that it be not made absolute until the petitioner had secured to the respondent an income of 20*l.* a year during their joint lives, *dum sola et casta vixerit*.

Lunacy of the respondent is, at any rate as a rule, no answer to a petition for dissolution of marriage (*z*).

The subject of this chapter is treated further in Part II. of this work, tit. "Practice in Suits for Dissolution" (p. 285); see also "Costs," *post*, Chap. XVI. (p. 228).

(*x*) *Dixon v. Dixon* (1892), 67 43 L. J. P. 49; 30 L. T. 649.
L. T. 394. See also *Yarrow v. Yarrow*,

(*y*) (1896) P. 37; 65 L. J. (1892) P. 92; 61 L. J. P. 69;
P. 35; 73 L. T. 759. 66 L. T. 383; *Hanbury v. Han-*

(*z*) *Mordaunt v. Moncrieffe bury*, (1892) P. 222; 61 L. J.
(1874), L. R., 2 H. L. (Sc.) 374; P. 115.

CHAPTER III.

JUDICIAL SEPARATION.

By section 7 of the Matrimonial Causes Act, 1857, "No decree shall hereafter be made for a divorce *a mensâ et thoro*; but in all cases in which a decree for a divorce *a mensâ et thoro* might now be pronounced, the Court may pronounce a decree for a judicial separation, which shall have the same force and the same consequences as a divorce *a mensâ et thoro* now has."

Judicial
separation :
grounds for.
M. C. Act,
1857 (20 & 21
Vict. c. 85),
s. 7.

And by section 16, "A sentence of judicial separation (which shall have the effect of a divorce *a mensâ et thoro* under the existing law, and such other legal effect as herein mentioned) may be obtained, either by the husband or the wife, on the ground of adultery, or cruelty, or desertion without cause for two years and upwards."

Ibid. s. 16.

By section 22, "In all suits and proceedings, other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which, *in the opinion of the said Court, shall be as nearly as may be conformable* to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained, and to the rules and orders under this Act."

Ibid. s. 22.

Temporary residence in England, without domicile, is sufficient to found the jurisdiction of the Court, in suits for judicial separation (*a*).

Adultery to found a decree for judicial separation must have been committed before the date of the petition.

(a) *Armytage v. Armytage*, (1898) P. 178 ; 67 L. J. P. 90 ; 78 L. T. 689.

Grounds for.

Cruelty,
what was, in
the Eccle-
siastical
Courts :
actual bodily
harm or
reasonable
apprehension
thereof ;
mere
incivility ;
words of
menace ;

motive im-
material.

attempt to
debauch
servants ;

In the Ecclesiastical Courts, before a husband could be found guilty of legal cruelty towards his wife, it was necessary to show that he had either inflicted bodily injury upon her, or had so conducted himself towards her as to render future cohabitation more or less dangerous to life, or limb, or mental or bodily health (*b*).

Therefore, want of civility, or actual rudeness or insult, or bad language, or abuse was not considered to amount to legal cruelty. But it was otherwise where words of menace, raising a reasonable apprehension of bodily harm, were made use of (*c*).

But where a party was found guilty of acts of legal cruelty, it was held that the motive prompting those acts was immaterial (*d*). In the Ecclesiastical Courts one act of cruelty—provided it was of sufficient gravity—was enough (*e*).

A husband's attempt to debauch his own female servants (*f*), and the bringing by him of groundless and malicious charges against his wife's chastity, unaccompanied by other acts, did not amount to legal cruelty.

(*b*) *Evans v. Evans* (1790), 1 Hagg. Con. C. 35; *Westmeath v. Westmeath* (1827), 2 Hagg. Suppl. 72; *Dysart v. Dysart* (1844), 1 Rob. Ecc. 106; 3 No. of Ca. 324; *Lockwood v. Lockwood* (1839), 2 Curt. 281; *D'Aguilar v. D'Aguilar* (1794), 1 Hagg. 775 (notis); *Simmons v. Simmons* (1847), 1 Rob. Ecc. 566; 5 No. of Ca. 334; *Smith v. Smith* (1814), 2 Phill. 212.

(*c*) *D'Aguilar v. D'Aguilar*, *supra*; *Kenrick v. Kenrick* (1831), 4 Hagg. 129; *Greenway v. Greenway* (1848), 6 No. of Cas. 221; *Geils v. Geils* (1848), 6 No. of Ca. 135; *Dysart v. Dysart* (1847), 5 No. of Ca. 194; *Chesnutt v. Chesnutt* (1854), 1

Sp. Ecc. & Ad. 198; *Neeld v. Neeld* (1831), 4 Hagg. 263; *Oliver v. Oliver* (1801), 1 Hagg. Con. C. 361; *Harris v. Harris* (1813), 2 Hagg. Con. C. 149; *Hulme v. Hulme* (1823), 2 Add. 27.

(*d*) *Kirkman v. Kirkman* (1807), 1 Hagg. Con. C. 409; *Holden v. Holden* (1810), 1 Hagg. Con. C. 458.

(*e*) *Holden v. Holden*, *supra*; *Popkin v. Popkin* (1794), 1 Hagg. 765 (note); *Geils v. Geils*, *supra*.

(*f*) *Durant v. Durant* (1825), 1 Hagg. E. R. 769; *Popkin v. Popkin*, *supra*; *Gale v. Gale* (1852), 2 Robert. Ecc. R. 421.

The wilful communication of a venereal disease was held to be cruelty, but the disease must have been actually communicated (*g*). It is not now necessary to prove that the disease was wilfully or recklessly communicated; it is sufficient for the wife to prove that it was in fact communicated by the husband (*h*).

Grounds for.
Cruelty, what was, in Ecclesiastical Courts.
Venereal disease.

Wilful communication of a cutaneous complaint, if it stood alone, was held insufficient for a sentence of separation (*i*).

Cutaneous disease.

Spitting in the face is said to have been held by the Ecclesiastical Courts to amount to legal cruelty (*k*).

Spitting in the face.

The doctrine that subsequent acts of cruelty, or conduct not amounting to cruelty, but which caused a reasonable apprehension of violence, would revive condoned cruelty, held in the Ecclesiastical Courts (*l*).

Revival of condoned cruelty.

Allowing for the physical difference between the sexes and the greater power of the husband, in ordinary circumstances, to protect himself, that which would be cruelty if practised by a husband towards his wife was held to be cruelty if practised by a wife towards her husband (*m*).

Difference of sexes.

A wife was not entitled to a decree on the ground of her husband's cruelty, if he had been provoked into the acts complained of by her (*n*), unless the violence of his retaliation had been out of proportion to the provocation received (*o*).

Provocation.

(*g*) *Ciocchi v. Ciocchi* (1853), 1 Sp. Ecc. & Ad. 121.

(*h*) *Browning v. Browning*, (1911) P. 161; 104 L. T. 750; 80 L. J. P. 74; and see note on p. 67, *post*.

(*i*) *Chesnutt v. Chesnutt* (1854), 1 Ecc. & Add. 196.

(*k*) But see *Cloborn's Case* (1630), Hetley, 149. See also *Saunders v. Saunders* (1847), 5 No. of Ca. 408; *D'Aguilar v. D'Aguilar* (1794), 1 Hagg. Ecc. 773.

(*l*) *Westmeath v. Westmeath* (1827), 2 Hagg. Suppl. 72.

(*m*) *Furlonger v. Furlonger* (1847), 5 No. of Ca. 425.

(*n*) *Walls court v. Walls court* (1847), 5 No. of Ca. 121; *Waring v. Waring* (1813), 2 Hagg. Con. C. 153.

(*o*) *Best v. Best* (1823), 1 Add. 411; *Taylor v. Taylor* (1755), 2 Lee, 172; *Holden v. Holden* (1810), 1 Hagg. Con. C. 458; *Dysart v. Dysart* (1844), 1 Rob. Ecc. 106; 3 No. of Ca. 324.

Grounds for.

Compromise
in Ecclesi-
astical
Courts.

Cruelty, what
is since 1857.

A question of
fact ;
must render
further
cohabitation
unsafe ;
where safety
of petitioner
has not been
compromised ;

single act ;
reasonable
apprehension
of further
violence.

Acts done
under in-
fluence of
disease.

The Ecclesiastical Courts allowed a suit for divorce *a mensâ et thoro* to be compromised by agreement (*p*).

Since the days of the Ecclesiastical Courts, however, the definition of "cruelty" has been extended, and the following are notes of some of the principal decisions on the subject of cruelty since the passing of the Matrimonial Causes Act, 1857:—

What conduct amounts to legal cruelty is a question of fact; and the question in every case is, whether "the husband has so treated his wife as to inflict bodily injury upon her, or cause reasonable apprehension of suffering or injury to her physically or mentally" (*q*); otherwise the acts complained of do not amount to legal cruelty (*r*).

In a case where the charges of cruelty were confined to three days alone of a cohabitation of three years, the Court, on the whole facts, held that the legal offence of cruelty had not been committed (*s*).

But where one act of violence is of such a character as to found a reasonable apprehension of further violence in case of cohabitation, the wife is entitled to the protection of the Court (*t*).

Acts of violence committed under the influence of an acute disorder, such as brain fever, where, the disorder having been subdued, there was no danger of their recurrence, were held not to be ground for a decree of judicial separation (*q*); but it was held otherwise where

(*p*) *Whitmore v. Whitmore*, 1 Lee, 30.

(*q*) See *Tomkins v. Tomkins* (1858), 1 S. & T. 168; *Curtis v. Curtis* (1858), 1 S. & T. 192; 27 L. J. P. 73; affirmed, 28 L. J. P. 55.

(*r*) *Milford v. Milford* (1866), L. R., 1 P. & D. 295; 37 L. J. P. 77; 15 L. T. 392; *Cousen v. Cousen* (1865), 4 S. & T. 164;

34 L. J. P. 139; 12 L. T. 712.

See also *Paterson v. Paterson*, 3 H. L. Cas. 308; *Birch v. Birch* (1873), 42 L. J. P. 23; 28 L. T. 40.

(*s*) *Plowden v. Plowden* (1870), 23 L. T. 266.

(*t*) *Reeves v. Reeves* (1862), 3 S. & T. 139; 32 L. J. P. 178; 8 L. T. 174.

the husband was suffering from attacks of delirium tremens (*u*). Grounds for.

Cruelty committed by an insane person has been held to be no ground for a judicial separation (*x*); but where the violence complained of was such as to lead to a suspicion of insanity, the Court would not go into that question, but looked only to the acts done (*y*). Cruelty, what is, since 1857. Delirium tremens. Insane person.

In *Kelly v. Kelly* (*z*), it was held that if moral force is systematically exerted to compel the submission of a wife, in such a manner, to such a degree, and during such a length of time, as to injure her health, although there be no actual physical violence, it amounts to legal cruelty; and this decision has been followed, not unfrequently, during recent years. Force, physical or moral.

In *Bethune v. Bethune* (*a*), Sir James Hannen granted a decree *nisi* for dissolution to a wife where no acts of physical violence had been committed by the respondent. 1891. Moral cruelty; absence of physical violence.

In *Walmesley v. Walmesley* (*b*), heard in 1893, neglect, coldness and insult, producing an attack of melancholia, were held to amount to legal cruelty. 1893. Ibid.

But in *Beauclerk v. Beauclerk* (*c*), the Court of Appeal held that no general rule could be laid down as to what amount of mere insults on the part of a husband towards a wife—in the absence of acts of physical violence—will amount to legal cruelty, but that each case must be decided on its own merits. 1891. Ibid.

A husband may be guilty of legal cruelty towards his wife by the mere fact of being criminally convicted, if the 1901. Conviction of husband.

(*u*) *Marsh v. Marsh* (1858), 1 S. & T. 312; 28 L. J. P. 13. 59; 39 L. J. P. 28; 22 L. T. 308.

(*x*) *Hall v. Hall* (1864), 3 S. & T. 347; 33 L. J. P. 65; 9 L. T. 810. (*a*) (1891) P. 205; 60 L. J. P. 18; 63 L. T. 259.

(*y*) *Martin v. Martin* (1860), 29 L. J. P. 106; 2 L. T. 118. (*b*) (1893), 69 L. T. 152. See also *Aubourg v. Aubourg* (1895), 72 L. T. 295.

(*z*) (1869), L. R., 2 P. & D. (*c*) (1891) P. 189; 60 L. J. P. 20; 64 L. T. 35.

Grounds for.

Cruelty, what is, since 1857.

Consequent breakdown of wife's health. 1896-7.

Moral cruelty, absence of physical violence.

disgrace and shock arising out of such conviction causes a breakdown of the health of his wife (*d*).

In *Russell v. Russell* (*e*) the Court of Appeal (diss. Rigby, L.J.) held that where a wife persisted in bringing against her husband by word of mouth, and in letters written to members of his family and others, a charge of having committed an unnatural offence, the charge not being true nor believed by her to be true, she had not been guilty of such cruelty as would entitle her husband to a decree of judicial separation.

This judgment was subsequently upheld on appeal to the House of Lords (*f*) by a majority of one, the Lord Chancellor, and Lords Hobhouse, Ashbourne and Morris giving judgment in favour of the appellant, and Lords Watson, Herschell, Macnaghten, Shand and Davey in favour of the respondent.

The judgment of the House of Lords in this case leaves the question of moral cruelty where it stood before. The only further observation it seems profitable to make is that the distinction must be always carefully borne in mind between a definition of cruelty in a case of judicial separation, where the Court is still hampered by "the principles and rules" of the Ecclesiastical Courts (*g*), and cases of dissolution of marriage—such as are most of those above cited—where it has a free hand.

1903.

Spreading false report about wife.

Constructive cruelty, children.

Where a husband spread a false report about his wife, the effect of which was to injure her health, he was held to be guilty of legal cruelty (*h*).

Acts of cruelty to children may amount to cruelty to

(*d*) *Thompson v. Thompson* (1901), 85 L. T. 172; *Bosworthick v. Bosworthick* (1901), 86 L. T. 121.

(*e*) (1895) P. 315; 64 L. J. P. 105; 73 L. T. 295. And see further as to other points in this important case, *post*, Chap. IV.

(p. 83), "Restitution of Conjugal Rights."

(*f*) (1897) A. C. 395; 66 L. J. P. 122; 77 L. T. 249.

(*g*) Mat. C. Act, 1857 (20 & 21 Vict. c. 85), s. 22.

(*h*) *Jeapes v. Jeapes* (1903), 89 L. T. 74.

the wife, when committed by the husband in the presence of the wife and for the purpose of giving her pain (*i*). Grounds for.

The Court has refused to interfere where the wife suffered great misery from her husband's drunkenness, but there was no violence (*k*). And even where habitual drunkenness has been coupled with a series of annoyances and extraordinary conduct (*l*), and acts of considerable violence (*m*), the Court has held that legal cruelty was not committed. But a husband's constant intoxication coupled with some slight acts of violence, and an attempt to cut his wife's throat, was held to constitute cruelty (*n*).

In 1898, it was held that if a woman marry a drunkard, with full knowledge that he is a drunkard, she is not on that account to be held to take, without redress, the risk of anything that may happen to her, as the consequence of his drunken habits (*o*).

Formerly, the communication of a venereal disease to the wife must have been wilful on the part of the husband to establish it as cruelty, although that wilfulness might be presumed from the surrounding circumstances; but now it is sufficient for the wife to prove that the disease was in fact communicated by the husband (*p*).

In *Waddell v. Waddell* (*q*), spitting in a wife's face, combined with other acts not of great violence, was held to amount to cruelty.

Cruelty, what is, since 1857.
Drunkenness.

1898.
Wife's knowledge of husband's drunken habits before marriage.

Venereal disease knowingly and wilfully communicated.

Spitting in face.

(*i*) *Suggate v. Suggate* (1859), 1 S. & T. 489; 28 L. J. P. 46. See also *Birch v. Birch* (1873), 42 L. J. P. 23; 28 L. T. 40; *Manning v. Manning* (1872), 6 Ir. Rep. Eq. 417; 7 Ib. 520; *Sant v. Sant* (1874), L. R., 5 P. C. 542; 43 L. J., P. C. 73; 30 L. T. 415.

(*k*) *Hudson v. Hudson* (1863), 3 S. & T. 314.

(*l*) *Brown v. Brown* (1865), 14 W. R. 318.

(*m*) *Scott v. Scott* (1860), 29 L. J. P. 64.

(*n*) *Power v. Power* (1865), 4

S. & T. 173; 34 L. J. P. 137; 13 L. T. 824.

(*o*) *Walker v. Walker* (1898), 77 L. T. 715; *Barrett v. Barrett* (1904), 20 T. L. R. 73.

(*p*) *Browning v. Browning*, (1911) P. 161; 104 L. T. 750; 80 L. J. P. 74, distinguishing *Brown v. Brown* (1865), L. R., 1 P. & D. 46; 35 L. J. P. 13; 13 L. T. 645; and not following *Morphett v. Morphett* (1869), L. R., 1 P. & D. 702; 38 L. J. P. 23; 19 L. T. 801.

(*q*) (1862), 2 S. & T. 584; 31 L. J. P. 123; 6 L. T. 552.

Grounds for.

Cruelty, what is, since 1857.

Insulting conduct.

Revival of condoned cruelty.

By wife.

Danger to respondent from her own conduct.

Insanity of respondent.

Decree cannot be made where complaining party guilty of adultery.

Also, where a husband by his behaviour to his wife in a public street, led a passer-by to take her for a common prostitute and insult her (*r*).

In *Knight v. Knight*, cruelty was established by proof of habitually insulting conduct and violent temper and threats.

Condoned cruelty may be revived by subsequent adultery (*s*); or by a persistent course of harsh and irritating conduct, unaccompanied by actual violence (*t*).

Repeated acts of unprovoked violence by a wife will be regarded as cruelty, although they may not inflict serious bodily injury on the husband (*u*).

In a suit by a husband for judicial separation on the ground of cruelty, the question is not simply whether the husband's safety is endangered, but the Court will also consider whether the wife's conduct may not endanger her safety by provoking her husband to retaliate (*x*).

Where a husband who has been confined in an asylum is subject to recurring fits of mania which may endanger the safety of the wife, she is entitled to a decree (*y*).

It was held by the Court of Appeal, reversing the decision of the Court below, that a judicial separation can only be granted where the petitioner comes to the Court with clean hands—that is, free from all matrimonial misconduct (*z*).

(*r*) *Milner v. Milner* (1861), 4 S. & T. 240; 31 L. J. P. 159. See also *Knight v. Knight* (1865), 4 S. & T. 103; 34 L. J. P. 112; 11 L. T. 252.

(*s*) *Palmer v. Palmer* (1860), 2 S. & T. 61; 29 L. J. P. 124; 2 L. T. 363.

(*t*) *Curtis v. Curtis* (1858), 1 S. & T. 192; 27 L. J. P. 73; affirmed, 28 L. J. P. 55; *Bostock v. Bostock* (1858), 1 S. & T. 221; 27 L. J. P. 86; *M'Keever v. M'Keever*, 11 Ir. R. Eq. 26. See also *Mytton v. Mytton* (1886),

11 P. D. 141; 57 L. T. 92.

(*u*) *Prichard v. Prichard* (1864), 3 S. & T. 523; 10 L. T. 789; *S. C.*, *nom. Pickard v. Pickard*, 33 L. J. P. 158.

(*x*) *Forth v. Forth* (1867), 36 L. J. P. 122; 16 L. T. 574.

(*y*) *Hanbury v. Hanbury*, (1892) P. 222; 61 L. J. P. 115.

(*z*) *Otway v. Otway*, *Otway v. Otway and Hoffer* (1888), 13 P. D. 141; 57 L. J. P. 81; 59 L. T. 153 (*Drummond v. Drummond* (Queen's Proctor intervening) (1861), 30 L. J. P. 177,

Desertion has only been a ground of petition for divorce or judicial separation since the Matrimonial Causes Act, 1857. In the Ecclesiastical Courts it was only recognized as a ground for restitution of conjugal rights, and indeed some of the earlier decisions on the subject of desertion, since the institution of the Divorce Court, are scarcely reconcilable with the more liberal view of the subject that has been taken by the Court in later years.

By the words of the statute itself (*a*) desertion must be for "two years and upwards," and the party charged with desertion must have withdrawn from cohabitation contrary to the wish of the petitioner (*b*).

Where a husband and wife parted of necessity, as (1) where the husband left home to seek employment (*c*), and (2) where the wife left Jamaica, where her husband had an appointment, on account of her health (*d*); and the wife in the one case showed no desire to live with her husband again, and in the other had actually refused to return to him, though he provided the money for her to do so; the Court held there was no desertion by the husband, though he had made no attempt to return to his wife, and the parties had remained apart for many years.

Where the husband, being in difficulties in the first instance, enlisted and went to India, but never, after dis-

Grounds for.
Desertion,
what is;

mere separation.
tion.

Leaving home
with wife's
consent to
seek employ-
ment.
Wife leaving
home for
health and
not offering
to return.

Husband
ceasing to
correspond
with wife.

approved). See also *Butler v. Butler and Burnham* (1890), 63 L. T. 256. And see further on the subject of cruelty the following cases decided in the same year:—*Badham v. Badham and Gorst* (1890), 62 L. T. 663; *Forsyth v. Forsyth, Eccles and Foster* (1890), 63 L. T. 263; and for a case in which a wife obtained a decree of judicial separation for the husband's adultery, although the jury found she had been guilty of desertion, see *Duplany*

v. Duplany (Cohen intervening), (1892) P. 53; 61 L. J. P. 49; 66 L. T. 267.

(*a*) Mat. C. Act, 1857, ss. 16, 27.

(*b*) *Ward v. Ward* (1858), 1 S. & T. 185; 27 L. J. P. 63.

(*c*) *Thompson v. Thompson* (1858), 1 S. & T. 231; 27 L. J. P. 65.

(*d*) *Keech v. Keech* (1868), L. R., 1 P. & D. 641; 38 L. J. P. 7; 19 L. T. 462.

Grounds for.

Desertion,
what is,
since 1857.
Generally
must be
desertion at
time of sepa-
ration.
Husband in
prison.

charge, corresponded with his wife or contributed to her support, he was held guilty of desertion (*e*).

But where a wife instituted a suit for divorce, in which she failed, and the parties never afterwards resumed cohabitation, the Court held there was no desertion by the husband (*f*).

A husband separated from his wife, with her consent, to avoid arrest for theft, and was afterwards imprisoned. After his release he desired to return to cohabitation with his wife, but she refused. The Court held that he had not deserted her (*g*).

Sentence of
penal
servitude.

But where a husband deserted his wife and was subsequently sentenced to penal servitude, and before his time expired the wife petitioned for dissolution, on the ground of adultery with desertion, the Court held that desertion was established (*h*).

Not consort-
ing with
wife.

To neglect opportunities of consorting with a wife is not necessarily to desert her (*i*).

Wife entitled
to husband's
society, &c.

But a husband must not abandon the society of his wife altogether without good cause, and even if, after doing so, he pays her an allowance regularly, that is no answer to the charge of desertion (*k*).

Reasonable
excuse for.

A "reasonable excuse" for leaving a wife must be grave and weighty; mere frailty of temper and habits which are distasteful to a husband are not sufficient ground for depriving a wife of the protection of his home and society (*l*).

(*e*) *Henty v. Henty* (1875), 33 L. T. 263. See also *Smith v. Smith*, 58 L. T. 639.

(*f*) *Fitzgerald v. Fitzgerald* (1869), L. R., 1 P. & D. 694; 38 L. J. P. 14; 19 L. T. 575. See also *Taylor v. Taylor* (1881), 44 L. T. 31.

(*g*) *Townsend v. Townsend* (1873), L. R., 3 P. & D. 129; 42 L. J. P. 71; 29 L. T. 254.

(*h*) *Astrophe v. Astrophe* (1859), 29 L. J. P. 27. See also *Drew v. Drew* (1888), 13 P. D. 97; 57 L. J. P. 64; 58 L. T. 923.

(*i*) *Williams v. Williams* (1864), 3 S. & T. 547; 33 L. J. P. 172.

(*k*) *Macdonald v. Macdonald* (1859), 4 S. & T. 242.

(*l*) *Yeatman v. Yeatman* (1868), L. R., 1 P. & D. 489;

Intemperance, gross and habitual, and violence of temper, uncontrolled and persistent, are not sufficient reasons to justify a husband in going away and leaving his wife without support (*m*). Grounds for Desertion.
Intemperance.

And the same was held, where the husband had lived unhappily with a wife, who had been a prostitute (*n*). Wife a prostitute.

But any matrimonial offence, such as adultery, cruelty, &c., which would be an answer to a suit for restitution of conjugal rights, is a reasonable excuse. Matrimonial offences.

Where a husband found his wife submitting to indecent liberties (*o*); where a girl of sixteen, who had married a man twenty years older than herself without the consent of her family, was removed by them to the Continent, and never saw her husband again (*p*); and where the parties had separated after a few months of married life, owing to non-consummation of the marriage through the fault of the wife (*q*); the Court held that there was *reasonable excuse* for the husband leaving his wife (*r*).

But where a husband left his wife, and refused to return to her unless she wrote a letter exonerating a certain lady of whom she had good reason to be jealous, but she refused to do so, though she was willing to live with her husband, and pressed him to return to her, which he declined to do: the Court held his conduct amounted to desertion (*s*). Unreasonable condition as to return imposed by husband.

37 L. J. P. 37; 18 L. T. 415; *Yeatman v. Yeatman and Rum-mell* (1870), L. R., 2 P. & D. 187; 39 L. J. P. 77; 23 L. T. 283.

(*m*) *Heyes v. Heyes and Mason* (1887), 13 P. D. 11; 51 L. J. P. 22; 57 L. T. 815. See also *Beer v. Beer* (1906), 94 L. T. 704.

(*n*) *Coulthart v. Coulthart and Goulthwaite* (1859), 28 L. J. P. 21; 32 L. T., O. S. 394.

(*o*) *Haswell v. Haswell and*

Sanderson (1859), 1 S. & T. 502; 29 L. J. P. 21; 1 L. T. 69.

(*p*) *Du Terreaux v. Du Terreaux* (1859), 1 S. & T. 555; 28 L. J. P. 95.

(*q*) *Ousey v. Ousey and Atkinson* (1874), L. R., 3 P. & D. 223; 43 L. J. P. 35; 30 L. T. 911.

(*r*) See also *Proctor v. Proctor; Smith v. Pitman* (1865), 4 S. & T. 140; 34 L. J. P. 99; 12 L. T. 505.

(*s*) *Dallas v. Dallas* (1874), 43 L. J. P. 87; 31 L. T. 271.

Grounds for.

Desertion.

Separation by mutual consent—offer to return not *bonâ fide*.

Ibid., payment by husband not to molest.

Separation not desertion at first may become so afterwards.

Husband willing to return to cohabitation, but living in adultery.

Husband may be guilty of desertion though wife leaves matrimonial home first.

Wife not obliged to remain with husband who is living in adultery.

Where the parties separated by mutual consent at the instance of the wife, and the husband six years afterwards made an offer to return to cohabitation (*t*); and where a husband left his wife and offered her 100*l.* on condition that she would not molest him in future, and she accepted the money (*u*): the Court held there was no desertion.

Though the separation be not desertion in its inception, it may become such afterwards: as where a husband leaves his wife, in the first instance, for some good purpose, with her consent, and afterwards breaks off all connexion with her and lives in adultery (*x*).

A husband may be guilty of desertion, even though willing to return to his wife, if—at the time he is so willing—he is actually cohabiting with another woman (*y*).

Desertion is not to be tested by inquiring which party left the matrimonial home first. The party who by his or her act brings the cohabitation to an end commits the desertion. There is no substantial difference between a husband who leaves his wife, and one who puts an end to the cohabitation by persisting in a course of conduct which obliges his wife to leave him. A wife is not obliged to live with a husband who persists in an adulterous intercourse. If she be willing to live with him if he gives it up, and he persists in it, the same condition of things is produced as if he had left her in the first instance (*z*).

(*t*) *Cooper v. Cooper* (1875), 33 L. T. 264.

(*u*) *Buckmaster v. Buckmaster* (1869), L. R., 1 P. & D. 713; 38 L. J. P. 73; 21 L. T. 231.

(*x*) *Gatehouse v. Gatehouse* (1867), L. R., 1 P. & D. 331; 36 L. J. P. 121; 16 L. T. 34; *Stickland v. Stickland* (1876), 35 L. T. 767. See also *Cudlipp v. Cudlipp* (1858), 1 S. & T. 229; 27 L. J. P. 64.

(*y*) *Edwards v. Edwards*

(1893), 62 L. J. P. 33; following *Farmer v. Farmer* (1884), 9 P. D. 245; 53 L. J. P. 113; and *Garcia v. Garcia* (1888), 13 P. 216; 57 L. J. P. 101; 59 L. T. 524.

(*z*) *Sickert v. Sickert*, (1899) P. 278; 68 L. J. P. 114; 81 L. T. 495. See also *Dickinson v. Dickinson* (1889), 62 L. T. 330; *Graves v. Graves* (1864), 3 S. & T. 350; 33 L. J. P. 66; 10 L. T. 273; *Wynne v. Wynne*,

Where a husband left his wife, saying he would never return, and for many years had not maintained her, and only saw her on two or three occasions with the sole object of obtaining her money: the Court held, that the separation could not be taken to be by mutual consent merely because the wife, in her letters written after the desertion, made use of casual expressions, wrung from her by her husband's misconduct, to the effect that she did not desire to see him or that he should visit her (a).

Grounds for.
Desertion.

When the right to relief has once accrued by a desertion for two years and upwards, a *bonâ fide* offer to return will not *per se* take away that right (b).

Offer to
return made
by respon-
dent.

In *Millar v. Millar* (c), a judicial separation was decreed on a husband's petition, by reason of his wife's desertion of him for two years and upwards, without reasonable cause.

Now by virtue of section 5 of the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), a respondent who fails to comply with a decree of the Court for restitution of conjugal rights shall *thereupon be deemed to be guilty of desertion without reasonable cause*, and proceedings for judicial separation, or (if coupled with adultery) for divorce, may be taken against such respondent.

Mat. C. Act,
1884, s. 5.
After decree
of restitution
of conjugal
rights.

For cases under section 5 (a) of the Summary Jurisdiction (Married Women) Act, 1895, see p. 218.

For cases where a judicial separation has been granted on the ground of desertion, or a dissolution of marriage on the ground of adultery and desertion by virtue of the provisions of this statute, see *Harding v. Harding* (d)

(1898) P. 18; 67 L. J. P. 5;
Koch v. Koch, (1899) P. 221;
68 L. J. P. 90; 81 L. T. 61;
Pizzala v. Pizzala (1896), not
reported.

(a) *Meara v. Meara* (1866), 35
L. J. P. 33. See also *Martin v.*
Martin (1898), 78 L. T. 568.

(b) *Cargill v. Cargill* (1858), 1
S. & T. 235; 27 L. J. P. 69.
See also *Basing v. Basing* (1864),
3 S. & T. 516; 33 L. J. P. 150;
10 L. T. 756.

(c) (1883), 8 P. D. 187.

(d) (1886), 11 P. D. 111; 55
L. J. P. 59; 56 L. T. 919.

Grounds for. and *Bigwood v. Bigwood* (e). See also *Russell v. Russell* (f).

Desertion.

1890.

Husband who had committed adultery offering to return and live with his wife—wife refusing to receive him.

A husband and wife parted for a time by mutual agreement. Subsequently the husband offered to return to his wife, but she, having discovered that he had committed adultery, refused to receive him, and sent him a letter to the effect that she would never live with him again. The Court held, that there being no proof that the husband's offers to live with her again were not *bonâ fide*, his conduct did not amount to desertion (g). And

Where a husband, who had been induced to marry his wife by her false representations as to her means and condition, was held not to have been guilty of desertion, though he had left his wife without support for seven years, see *Kennedy v. Kennedy* (h).

1890.

Bona fides of husband's offers to return question of fact.

Whether a husband's offers to return to his wife are *bonâ fide* or not is a question of fact for the jury (i).

Where the parties have parted by mutual agreement in the first instance, as where the husband has left home on *bonâ fide* business, or where the wife has been the first to leave home, and the husband is subsequently charged with desertion, the date when such desertion first commenced becomes most important, as the statutory period of "*two years and upwards*" must be complete before proceedings can be taken on this charge. The decisions on this point differ somewhat.

1891.

When desertion commences.

A husband and wife parted in 1877, and the husband went to Australia. They continued to correspond for some years. In 1886 the wife—who had heard rumours as to her husband's mode of life—went to Australia, partly to inquire into their truth and partly on business.

(e) (1888), 13 P. D. 89; 57 L. T. 467.
L. J. P. 80; 58 L. T. 642.

(f) (1895) P. 315; 64 L. J. P. 105; 73 L. T. 295.

(g) *Lodge v. Lodge* (1890), 15 P. D. 159; 59 L. J. P. 84; 63

L. T. 467. (h) (1890), 62 L. T. 705.

(i) *French Brewster v. French Brewster*; *French Brewster v. French Brewster and Gore* (1889), 62 L. T. 609.

She found him living in adultery. She made no attempt to resume cohabitation with him, and he had contributed nothing to her support. Held, that desertion had commenced in 1886 (*j*). Grounds for.
Desertion.

In *Duplany v. Duplany* (*k*), the jury found that the husband had committed adultery, but had not been guilty of cruelty, and that the wife had deserted the husband without reasonable cause. The Court held that the wife's desertion of her husband was no bar to her obtaining a judicial separation on the ground of his adultery. 1892.
Husband guilty of adultery, but not cruelty; wife guilty of desertion; decree of judicial separation in favour of wife.

In *Russell v. Russell* (*l*), the Court of Appeal held that reckless spreading abroad a false charge by the wife against the husband to the effect that he had been guilty of an unnatural offence did not amount to legal cruelty. From this judgment Rigby, L.J., dissented, but it was confirmed by the House of Lords (*m*). At the same time it was unanimously held—and this portion of the judgment was not questioned in the Lords—that the desertion of the wife by the husband under such circumstances was not desertion without cause entitling her directly to a decree of judicial separation. 1895.
Wife guilty of improper conduct not amounting to cruelty; husband's desertion of her held justifiable.

A wife has no right, without cause, to refuse to allow her husband to have sexual intercourse with her; and if Refusal to allow sexual intercourse.

- (*j*) *Drew v. Drew* (1891), 64 L. T. 840. See also *Thompson v. Thompson* (1858), 1 S. & T. 231; 27 L. J. P. 65; *Keech v. Keech* (1868), L. R., 1 P. & D. 641; 38 L. J. P. 7; 19 L. T. 462; *Henty v. Henty* (1875), 33 L. T. 263; *Smith v. Smith* (1888), 58 L. T. 639; *Astroe v. Astroe* (1859), 29 L. J. P. 27; *Drew v. Drew* (1888), 13 P. D. 97; 57 L. J. P. 64; 58 L. T. 923; *Crabb v. Crabb* (1868), L. R., 1 P. & D. 601; 37 L. J. P. 42; 18 L. T. 153; *Gatehouse v. Gatehouse* (1867), L. R., 1 P. & D. 331; 36 L. J. P. 121; 16 L. T. 34; *Stickland v. Stickland* (1876), 35 L. T. 767; *Farmer v. Farmer* (1884), 9 P. D. 245; 53 L. J. P. 113; *Garcia v. Garcia* (1888), 13 P. D. 216; 67 L. J. P. 101; 59 L. T. 524.
- (*k*) (1892) P. 53; 61 L. J. P. 49; 66 L. T. 267. See also *Dixon v. Dixon* (1892), 67 L. T. 394.
- (*l*) (1895) P. 315; 64 L. J. P. 105; 73 L. T. 295.
- (*m*) (1897) A. C. 395; 66 L. J. P. 122; 77 L. T. 249.

Grounds for. she refuses to live under the same roof with him, except
Desertion. upon his undertaking not to exercise his full marital rights, he is justified in separating himself from her, and is not guilty of desertion if he does so. Indeed, such conduct as above described amounts to "*desertion*" on the part of the wife (*n*).

Deed of separation held no bar to decree of judicial separation. Where, two years and two months after a husband left his wife, a deed of separation was executed by the parties, by which she agreed to live apart from him, but there was no covenant not to sue or condone past offences, the Court granted the wife a judicial separation on the ground of desertion (*o*).

Agreement to live apart without reasonable cause. And where a husband, without reasonable excuse, obtained from his wife an agreement that they should live apart from each other, the Court held that he had deserted her (*p*).

Bargaining away right to relief. In *Parkinson v. Parkinson* (*q*), a husband deserted his wife, but, within two years from the desertion, a deed of separation was agreed to, wherein he covenanted to make her an allowance, and charge it upon his reversionary interest in a sum of money, but no part of the allowance was ever paid. The Court held that the wife had bargained away her right to relief.

Deed of separation not acted on. Where a husband and wife executed a deed of separation, but none of its provisions were ever carried into effect (*r*), and the cohabitation was continued after its

(*n*) *Synge v. Synge*, (1900) P. 180; 69 L. J. P. 106; 83 L. T. 224; affirmed on appeal, (1901) P. 317; 70 L. J. P. 97; 85 L. T. 83.

(*o*) *Moore v. Moore, Chadwick and Griffiths* (1887), 12 P. D. 193; 56 L. J. P. 104; 57 L. T. 568.

(*p*) *Dagg v. Dagg and Speake* (1882), 7 P. D. 17; 51 L. J. P. 19; 47 L. T. 132.

(*q*) (1869), L. R., 2 P. & D. 25; 39 L. J. P. 14; 21 L. T. 732; and for another case in which a deed of separation was held to be a bar to a judicial separation, see *Crabb v. Crabb* (1868), L. R., 1 P. & D. 601; 37 L. J. P. 42; 18 L. T. 153.

(*r*) *Cock v. Cock* (1864), 3 S. & T. 514; 33 L. J. P. 157; 10 L. T. 726.

execution, the husband having subsequently deserted the wife, it was held she was entitled to relief, notwithstanding the deed. Grounds for.
Desertion.

And where the wife had been induced to sign a deed of separation, which, however, had not been carried out in consequence of the refusal of the trustee to act, the husband was held to be guilty of desertion (s).

Cohabitation does not necessarily imply continued residence daily and nightly under one roof. Circumstances, such as domestic service, business duties, may separate husband and wife, and there may yet be an existing state of cohabitation, and the husband or wife who brings this state of things to an end may become guilty of desertion (t). 1897 to 1904.
Cohabitation,
what amounts
to.

A husband and wife were married at the registry office at Edinburgh. Afterwards they walked together to the Roman Catholic Cathedral, where the religious ceremony of marriage was solemnized. Immediately after the ceremony they parted, and never met again except for a few minutes at a railway station. They were never alone together after the ceremony. The wife's father refused to allow cohabitation until the husband was in a position to keep his wife. The husband never made any attempt at cohabitation with his wife, and was not heard of for many years, when he was found living with another woman. The Court, in spite of there having been no cohabitation, either actual or constructive, found that he had deserted his wife (u). 1899.
Desertion
without
actual cohabi-
tation of
any sort.

For decisions as to the meaning of the word "desertion," as used in the Summary Jurisdiction (Married

(s) *Nott v. Nott* (1866), L. R., 1 P. & D. 251; 36 L. J. P. 10; 15 L. T. 299. table (1899), 68 L. J. P. 83;
Kay v. Kay, (1904) P. 382; 73
L. J. P. 108; 91 L. T. 360.

(t) *Bradshaw v. Bradshaw*, (1897) P. 24; 66 L. J. P. 31; 75 L. T. 391; *Huxtable v. Hux-* (u) *De Laubeuque v. De Lau-*
beuque, (1899) P. 42; 68 L. J.
P. 20; 79 L. T. 708.

Grounds for. — Women) Act, 1895 (58 & 59 Vict. c. 39), see *post*, Chap. XIV. (p. 212).

Sodomitical practices.

The Ecclesiastical Courts held that an attempt to commit the crime of sodomy or bestiality was sufficient ground for a divorce *a mensâ et thoro* (*x*), and consequently the same power is now assigned to the Divorce Court on petitions for judicial separation (*y*). As to the evidence requisite to support such a charge, see "Archbold's Criminal Pleading," tit. *Sodomy*.

Effect of decree of judicial separation in previous suit.

Where a wife, in answer to the husband's petition for dissolution on the ground of her adultery, pleaded that in a prior suit she had been judicially separated from him, the Court held that the prior decree was no bar to the suit (*z*).

Ibid.

On a wife's petition for dissolution, by reason of her husband's adultery and cruelty, the second charge may be established by the production of a previous decree for judicial separation pronounced against him, on the ground of cruelty (*a*).

Compromise of suit.

A suit for judicial separation may be compromised by agreement, and neither party is at liberty to repudiate the agreement, except on the ground of fraud, or of such an error in its terms that they ought not to be bound by it, and such agreement may be made a rule of the High Court (*b*).

Defences to suit for.

As the Divorce Court is bound to follow as nearly as possible the principles and rules of the Ecclesiastical Courts

(*x*) *Mogg v. Mogg* (1824), 2 Add. 292; *Bromley v. Bromley* (1793), 2 Add. 158.

(*y*) Mat. C. Act, 1857, s. 7.

(*z*) *Yeatman v. Yeatman and Rummell* (1870), 21 L. T. 733.

(*a*) *Bland v. Bland* (1866), L. R., 1 P. & D. 237; 35 L. J. P. 104; *Green v. Green* (1873), L. R., 3 P. & D. 121; 43 L. J. P. 6; 29 L. T. 251. See also

Ritchie v. Ritchie (1861), 4 Macq. H. L. Cas. 162.

(*b*) *Hooper v. Hooper* (1863), 3 S. & T. 251; *Ib.*, 1 S. & T. 219; 29 L. J. P. 59. See also *Smythe v. Smythe* (1887), 18 Q. B. D. 544; 56 L. J., Q. B. 217; 56 L. T. 197; *Lancaster v. Lancaster*, (1896) P. 118; 65 L. J. P. 34; 74 L. T. 64.

in dealing with suits for judicial separation (*c*), a few notes are added here as to defences before those tribunals in cases of divorce *a mensâ et thoro*.

The Ecclesiastical Courts withheld from a guilty husband the remedy against a guilty wife, and *vice versâ* (*d*), unless there were extenuating circumstances (*e*).

But they recognized no distinction between a delinquency of one party committed *before* or *after* the other party's infidelity in its complete efficiency as a bar to a claim for relief (*f*).

Improper conduct, short of adultery, was sometimes held sufficient to bar relief (*g*).

In *Hunt v. Hunt* (*h*), a wife negatived a charge of adultery by proving she was *virgo intacta*.

Cruelty was no bar to a suit by the husband for a divorce *a mensâ et thoro* on the ground of the wife's adultery (*i*), but it was often pleaded in conjunction with a counter-charge of adultery, because it was thought that it might tend to throw some light upon it (*k*).

Forbearance or delay in instituting proceedings, on the part of the wife (*l*), was not held by the Ecclesiastical

Defences to
suit for.

What were,
in Ecclesi-
astical Courts
in suits for
divorce *a*
mensâ et thoro.

No distinction
between
adultery
before or
after cause of
complaint.

Improper
conduct not
amounting to
adultery;
wife *virgo*
intacta;
cruelty of
husband
petitioner.

Forbearance
or delay on
part of wife.

(*c*) Mat. C. Act, 1857, s. 22.

(*d*) *Forster v. Forster* (1790), 1 Hagg. Con. C. 144. See also *Astley v. Astley* (1828), 1 Hagg. 722; *Beeby v. Beeby* (1799), 1 Hagg. 790.

(*e*) *Anichini v. Anichini* (1839), 2 Curt. 214.

(*f*) *Proctor v. Proctor* (1819), 2 Hagg. Con. C. 299.

(*g*) *Forster v. Forster, Astley v. Astley, supra*. See also as to pleading adultery in answer to a suit, on the ground of cruelty, in the Ecc. Courts, *Cocksedge v. Cocksedge* (1844), 1 Robert. 90.

(*h*) (1856), 1 Dea. & Sw. Ecc. Cas. 121.

(*i*) *Harris v. Harris* (1829), 2 Hagg. 411; *Dillon v. Dillon* (1841), 3 Curt. 90; *Moorsom v. Moorsom* (1792), 3 Hagg. 92; *Chambers v. Chambers* (1810), 1 Hagg. Con. C. 452; *Tuthill v. Tuthill* (1862), 31 L. J. P. 214.

(*k*) *Cocksedge v. Cocksedge* (1844), 1 Robert. 92; *Forster v. Forster* (1760), 1 Hagg. Con. C. 146; *Eldred v. Eldred* (1840), 2 Curt. 380; *Arkley v. Arkley* (1821), 3 Phill. Ecc. Rep. 500; *Chettle v. Chettle* (1821), Ib. 507.

(*l*) *Ferrers v. Ferrers* (1788), 1 Hagg. Con. C. 130.

Defences to suit for, since 1857.

—
Separation by consent or desertion.

Courts to be a bar to a decree, except under very special circumstances (*m*).

Separation by articles or agreement and desertion were not considered by the Ecclesiastical Courts as bars to relief (*n*).

And although in 1892 it was held that *desertion* by the petitioner is a bar to a decree of judicial separation (*o*).

In 1905 it was held that when the Court found that the desertion of the husband had conduced to the adultery of the respondent, the petitioner was not entitled to a decree of judicial separation (*p*).

Defences to suit for judicial separation at present day.

The principal defences to a suit for judicial separation at the present day are adultery, cruelty, condonation, and collusion committed by the party claiming relief, all which subjects have been already fully dealt with.

Wife's adultery. Parties living apart under deed.

It is sometimes alleged, in answer to a suit for judicial separation, that the parties have been living apart under a deed, not as a direct bar to the suit, but as a fact, amongst others, to show that the petition was not presented *bonâ fide* (*q*).

Estoppel.

Another form of defence (by way of estoppel) may be that the allegations against the respondent are *res judicata* (*r*).

(*m*) *Walker v. Walker* (1813), 2 Phill. 153.

(*n*) *Nash v. Nash* (1790), 1 Hagg. Con. C. 140; *Beeby v. Beeby* (1798), Ib. 142 (notis); *Morgan v. Morgan* (1841), 2 Curt. 686; *Reeves v. Reeves* (1813), 2 Phill. 125; *Sullivan v. Sullivan* (1824), 2 Add. 302.

(*o*) *Duplany v. Duplany* (Cohen intervening), (1892) P. 53; 61 L. J. P. 49; 66 L. T. 267. See also *Dixon v. Dixon* (1892), 67 L. T. 394.

(*p*) *Hodgson v. Hodgson and Turner*, (1905) P. 233; 74 L. J.

P. 140; 93 L. T. 446.

(*q*) *Williams v. Williams* (1866), L. R., 1 P. & D. 178; 35 L. J. P. 85; 14 L. T. 770. See also *Brown v. Brown and Shelton* (1874), L. R., 3 P. & D. 202; 43 L. J. P. 47; 31 L. T. 272.

(*r*) See *Ciocchi v. Ciocchi* (1859), 29 L. J. P. 30, 60; *Finney v. Finney* (1868), L. R., 1 P. & D. 483; 37 L. J. P. 43; 18 L. T. 489; *Robinson v. Robinson* (1877), 2 P. D. 75; 46 L. J. P. 47; 36 L. T. 414; *Conradi v. Conradi, Worrall and*

Delay is not a bar to a suit for judicial separation on the ground of cruelty, but it is a material fact for the consideration of the Court, as tending to show that there was no serious apprehension of further violence (*s*), or that the suit was instituted for some collateral object (*t*).

Defences to suit for, since 1857.

Delay, how far a bar.

An impediment to marital intercourse, supervening after marriage, does not constitute a defence for a suit instituted in consequence of adultery (*u*).

Supervening impotence.

By section 23 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), "Any husband or wife, upon the application of whose wife or husband, as the case may be, a decree of judicial separation has been pronounced, may, at any time thereafter, present a petition to the Court praying for a reversal of such decree on the ground that it was obtained in his or her absence, and that there was reasonable ground for the alleged desertion, where desertion was the ground of such decree; and the Court may, on being satisfied of the truth of the allegations of such petition, reverse the decree accordingly; but the reversal thereof shall not prejudice or affect the rights or remedies which any other person would have had in case such reversal had not been decreed, in respect of any debts, contracts, or acts of the wife incurred, entered into, or done between the times of the sentence of separation and the reversal thereof."

Mat. C. Act, 1857, s. 23.

Petition for reversal of decree of judicial separation on ground of absence.

In the case of *Phillips v. Phillips* (*x*), the Court held, that the absence referred to in the statute is not an absence from want of notice, but a simple non-appearance. The

Mere non-appearance.

Way (the Queen's Proctor intervening) (1868), L. R., 1 P. & D. 514; 37 L. J. P. 55; 18 L. T. 659.

(*s*) *Smallwood v. Smallwood* (1861), 2 S. & T. 397; 31 L. J. P. 3; 5 L. T. 324.

(*t*) *Cooke v. Cooke* (1863), 3 S. & T. 126; 32 L. J. P. 154; 8 L. T. 644; *Matthews v.*

Matthews (1859), 1 S. & T. 499; 29 L. J. P. 118; 2 L. T. 472; affirmed on appeal (1860), 3 S. & T. 161.

(*u*) *M. v. M.* (1861), 31 L. J. P. 168.

(*x*) (1866), L. R., 1 P. & D. 169; 35 L. J. P. 70; 14 L. T. 604.

Defences to
suit for, since
1857.

respondent had been personally served with the petition, but had not entered an appearance, in consequence of which he had received no notice of trial. His only excuse for his non-appearance at the hearing was that he was ignorant of the law, and had not seen fit to employ legal assistance.

See further on the subject of this chapter, Part II. of this work, tit. "Practice in Suits for Judicial Separation" (p. 405), and "Costs," *post*, Chap. XVI. (p. 228).

CHAPTER IV.

RESTITUTION OF CONJUGAL RIGHTS.

THE suit for "Restitution of Conjugal Rights," like the suit for "Judicial Separation," treated of in the last chapter, is governed by section 22 of the Matrimonial Causes Act, 1857 (*a*); and the Court is still bound in these suits by the principles and rules of the Ecclesiastical Courts.

In a suit for restitution of conjugal rights, the Ecclesiastical Courts held that no facts were sufficient to bar the proceeding, except such as would have been sufficient to have entitled the parties to a divorce *a mensâ et thoro* (*b*).

Where the wife pleaded in answer to her husband's suit for restitution that he had no fixed abode in this country, but that his residence was in Ireland, that she was in delicate health and confined to her house, and that she was, in the opinion of her medical attendants, incapable of removing to Ireland without imminent danger to her health, such allegations were admitted to proof (*c*). And where a suit for separation on account of the wife's adultery had been dismissed on the ground of the husband's connivance at her incest with his brother, it was held that it did not necessarily follow that the wife would succeed in a suit for restitution of conjugal rights (*d*).

Mat. C. Act, 1857 (20 & 21 Vict. c. 85), s. 22.

Defences : in Ecclesiastical Courts.

Answer should generally show facts entitling respondent to a judicial separation.

Exceptions : respondent's delicate health.

Petitioner, guilty of incest.

(*a*) *Ante*, p. 61.

2 Add. 249.

(*b*) *Holmes v. Holmes* (1755), 2 Lee, 116. See also *Barlee v. Barlee* (1822), 1 Add. 305.

(*d*) *Denniss v. Denniss* (1808), 3 Hagg. 353 (note). See also *Drew v. Drew* (1842), 1 No. of Cas. 315.

(*c*) *Molony v. Molony* (1824),

Defences in
Ecclesiastical
Courts.

Impropiety
of conduct.

Ante-nuptial
incontinence.

Cruelty.

Ground for
petition.

Object of
petition.

Marshall v.
Marshall.

View of
Sir James
Hannen.

Mat. C. Act,
1884.

Short title.

Periodical
payments in
lieu of
attachment.

Where in a suit for restitution brought by the wife the husband charged her with adultery, and proved gross impropriety of conduct, a separation was decreed (*e*).

Ante-nuptial incontinence of the wife, discovered by the husband subsequent to the marriage (*f*), and cruelty committed by the husband (*g*), were both held to be complete answers to a petition for restitution by the injured party.

The only ground for a petition for restitution is that one of the married persons has withdrawn from living with the other, without lawful cause.

Its primary object has always been assumed to be to obtain the return to cohabitation of the respondent. But it was said by Sir James Hannen, the then President, in *Marshall v. Marshall* (*h*), that he had never known an instance in which it appeared that the suit was instituted for any other purpose than to enforce a money demand.

To remedy this state of things, the Act 47 & 48 Vict. c. 68, dated August 14th, 1884, and commonly known as the Matrimonial Causes Act, 1884, was passed. This statute is in the following terms:—

“Section 1. This Act may be cited as the Matrimonial Causes Act, 1884.

“Section 2. From and after the passing of this Act a decree for restitution of conjugal rights shall not be enforced by attachment, but where the application is by the wife the Court may, at the time of making such decree, or at any time afterwards, order that in the event of such decree not being complied with within any time in that behalf limited by the Court, the respondent shall make to the petitioner such periodical payments as may be just, and such order may be enforced in the same manner as an order for alimony in a suit for judicial

(*e*) *Owen v. Owen* (1831), 4 Hagg. 261.

(*f*) *Perrin v. Perrin* (1822), 1 Add. 1.

(*g*) *Dysart v. Dysart* (1844), 1 Robert. 109.

(*h*) (1879), 5 P. D. 23; 48 L. J. P. 49; 39 L. T. 640.

separation. The Court may, if it shall think fit, order that the husband shall, to the satisfaction of the Court, secure to the wife such periodical payment, and for that purpose may refer it to any one of the Conveyancing Counsel of the Court to settle and approve of a proper deed or instrument to be executed by all necessary parties.

Mat. C. Act,
1884.

“Section 3. Where the application for restitution of conjugal rights is by the husband, if it shall be made to appear to the Court that the wife is entitled to any property, either in possession or reversion, or is in receipt of any profits of trade or earnings, the Court may, if it shall think fit, order a settlement to be made to the satisfaction of the Court of such property, or any part thereof, for the benefit of the petitioner and of the children of the marriage, or either or any of them, or may order such part as the Court may think reasonable of such profits of trade or earnings to be periodically paid by the respondent to the petitioner for his own benefit, or to the petitioner or any other person for the benefit of the children of the marriage, or either or any of them.

Settlements
of wife's
property.

“Section 4. The Court may from time to time vary or modify any order for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same order wholly or in part, as the Court may think just.

Power to
vary orders.

“Section 5. If the respondent shall fail to comply with a decree of the Court for restitution of conjugal rights such respondent shall thereupon be deemed to have been guilty of desertion without reasonable cause, and a suit for judicial separation may be forthwith instituted, and a sentence of judicial separation may be pronounced although the period of two years may not have elapsed since the failure to comply with the decree for restitution of conjugal rights; and when any husband who has been guilty of desertion by failure on his part

Non-com-
pliance with
decree
deemed to be
desertion.

Mat. C. Act,
1884. —

to comply with a decree for restitution of conjugal rights has also been guilty of adultery, the wife may forthwith present a petition for dissolution of her marriage, and the Court may pronounce a decree *nisi* for the dissolution of the marriage on the grounds of adultery coupled with desertion. Such decree *nisi* shall not be made absolute until after the expiration of six calendar months from the pronouncing thereof, unless the Court shall fix a shorter time.

Custody, &c.
of children.

"Section 6. The Court may, at any time before final decree on any application for restitution of conjugal rights, or after final decree if the respondent shall fail to comply therewith, upon application for that purpose, make from time to time all such orders and provisions with respect to the custody, maintenance, and education of the children of the petitioner and respondent as might have been made by interim orders during the pendency of a trial for judicial separation between the same parties.

Act to apply
to England
only.

"Section 7. This Act shall not extend to Scotland or Ireland."

Previous to the passing of this Act, there was no power to make orders for the custody, maintenance and education of children in suits for restitution (*i*).

Shortly after the passing of this Act it was held by the Court of Appeal that disobedience to a decree for restitution was no longer punishable by attachment (*k*).

Marriage
must be
proved.

In a suit for restitution, the Court has no jurisdiction to make a decree until the marriage has been formally proved, and every petitioner in this form of suit is entitled to a decree, unless a respondent can establish a legal defence to the petition (*l*).

- (*i*) *Chambers v. Chambers* L. J. P. 60; 52 L. T. 233.
(1870), 39 L. J. P. 56; 22 L. T. 277. (*l*) *Scott v. Scott* (1865), 4
S. & T. 113; 34 L. J. P. 23; 12
(*k*) *Weldon v. Weldon*, 54 L. T. 211.

But a decree of restitution will not be granted in an undefended suit, upon mere proof of the marriage; evidence of the other facts of the case must be given (*m*). But proof of marriage not alone sufficient.

A wife guilty of adultery cannot maintain a suit for restitution (*n*). Conduct of petitioner.

By Rule 175 of the Divorce Court Rules, 1865, a written demand for cohabitation and restitution of conjugal rights must be made by the petitioner upon the proposed respondent. R. 175. Previous demand for cohabitation necessary.

The demand required by the rule need not be actually written by the petitioner. It can be made by a solicitor or friend on petitioner's behalf, but must be couched in conciliatory terms, and must show a willingness on the part of the petitioner to resume cohabitation (*o*). Need not be written by petitioner, but must be in civil terms.

But if it is civil, and shows a desire to return to cohabitation, it may threaten legal proceedings in case of refusal (*p*). 1900. Demand, how made.

Although the mode of application in these suits remains the same, the effect of the decree has been materially altered by the Matrimonial Causes Act, 1884, just quoted. Statutory desertion. 47 & 48 Vict. c. 68, s. 5.

Where a wife or husband refuses to comply with a decree of restitution, the Court, on the further petition of the husband or wife, will, as a matter of course, grant him or her a decree of judicial separation (*q*). 1887. Husband disobeying decree of R. C. R.; judicial separation granted.

The statutory desertion arising under section 5, from non-compliance with a decree for restitution, has all the consequences of ordinary desertion for two years, and is 1903. Revival.

(*m*) *Pearson v. Pearson* (1864), 33 L. J. P. 156. (*p*) *Smith v. Smith* (1890), 15 P. D. 47; 59 L. J. P. 9; 62 L. T. 237. See also *Elliott v. Elliott* (1902), 85 L. T. 648, C. A.

(*n*) *Hope v. Hope* (1858), 1 S. & T. 94; 27 L. J. P. 43; 31 L. T., O. S. 138. (*q*) *Harding v. Harding* (1886), 11 P. D. 111; 55 L. J. P. 59; 56 L. T. 919.

(*o*) *Field v. Field* (1889), 14 P. D. 26; 58 L. J. P. 21; 59 L. T. 880. See also *Mason v. Mason* (1889), 61 L. T. 304.

therefore capable, after its condonation, of revival by subsequent adultery (*r*).

Statutory
desertion.
Mat. C. Act,
1884, s. 5.
Previous
adultery re-
vived by such
disobedience.

A wife obtained a decree for restitution, which not being complied with, she petitioned the Court for a decree of dissolution on the ground of desertion, arising from non-compliance with the decree, and adultery committed some time before. It was held that such desertion was on the same footing as desertion without cause for two years and upwards, and that the adultery was thereby revived (*s*). And such statutory desertion will also revive adultery previously committed (*s*).

Revival.

Decree, what
is sufficient
compliance
with.

It is not a sufficient compliance by a husband with a decree for restitution that he has provided his wife with a suitable establishment and sufficient income (*t*).

Disobedience
to decree ;
order for
settlement.

Wife's prop-
erty settled
without
power of
anticipation.

Where a wife who has separate estate refuses to obey a decree for restitution, the Court may order her to settle a permanent maintenance on her husband (*u*); but not where such separate estate is settled to her use without power of anticipation (*x*). A husband refusing to comply with a decree may be ordered to secure to his wife for their joint lives a "periodical payment," equal to one-third of their joint incomes (*y*).

Mat. C. Act,
1884, s. 3.
Evidence of
conduct of
respondent
during
cohabitation
tendered on
application

On an application for a settlement or allowance under section 3 of the Matrimonial Causes Act, 1884, out of the estate of a husband or wife, against whom a decree of restitution has been pronounced in an undefended suit, it is competent for the petitioner to tender evidence as to the conduct of the respondent during cohabitation (*z*).

(*r*) *Paine v. Paine*, (1903) P. 263; 73 L. J. P. 1; 89 L. T. 588.

(*s*) *Bigwood v. Bigwood* (1888), 13 P. D. 89; 57 L. J. P. 80; 58 L. T. 642.

(*t*) *Weldon v. Weldon* (1883), 9 P. D. 52; 53 L. J. P. 9.

(*u*) *Swift v. Swift* (1890), 15 P. D. 118; 59 L. J. P. 61; 62 L. T. 669.

(*x*) *Michell v. Michell* (No. 1), (1891) P. 208; 60 L. J. P. 46; 64 L. T. 607.

(*y*) *Theobald v. Theobald* (1889), 15 P. D. 26; 59 L. J. P. 21; 62 L. T. 187.

(*z*) *Swift v. Swift* (No. 2), (1891) P. 129; 60 L. J. P. 14;

63 L. T. 711; *Mason v. Mason* (1889), 61 L. T. 304.

The Court will not, on the hearing of a petition for restitution, consider any question as to amount of allowance to be paid by respondent to petitioner, in the event of a decree being pronounced and disobeyed. for settlement or allowance.

In the very early days of the Divorce Court it was held that a suit for restitution could not be sustained by a wife, who had committed adultery, although the husband had also committed adultery (*a*). Defences to suit for restitution. Both parties guilty.

It is no answer to a wife's suit for restitution of conjugal rights that the husband was induced to marry her on a false representation that she was pregnant by him (*b*). Husband induced to marry by false representations as to pregnancy.

Neither is it an answer that she has been guilty of impropriety of behaviour not amounting to a matrimonial offence, nor yet that she has previously refused to permit conjugal intercourse (*c*). Behaviour not amounting to matrimonial offence.

A wife petitioned for restitution; her husband pleaded in answer that she was addicted to drink, and had become dangerous to herself and others. Held, that husband had just cause for withdrawing from cohabitation, but that he was not entitled to a decree of judicial separation (*d*).

In a suit for restitution, facts which apparently do not, by themselves, constitute a complete answer to the charge may be relevant and important to the issue, and the Court will not refuse to inquire into them (*e*). Amount of evidence.

But the Court declined to receive evidence of ante-nuptial incontinence on the part of a petitioner, with a view of showing that her child born after marriage was 1889. Ante-nuptial incontinence of petitioner.

(*a*) *Hope v. Hope* (1858), 1 S. & T. 94; 27 L. J. P. 43; 31 L. T., O. S. 138. See also *Blackborne v. Blackborne* (1868), L. R., 1 P. & D. 563; 37 L. J. P. 73; 18 L. T. 450.

(*b*) *Green v. Green* (1869), 21 L. T. 401.

(*c*) *Rippingall v. Rippingall* and *Delacour; Rippingall v. Rippingall* (1876), 24 W. R. 967.

(*d*) *Beer v. Beer* (1906), 94 L. T. 704.

(*e*) *Stace v. Stace* (1868), 37 L. J. P. 51; 18 L. T. 740. See also *Woodey v. Woodey* (1874), 31 L. T. 647.

Defences to
suit for
restitution.

Agreement
not to sue for
restitution ;

decree in
spite of.

Violent
temper,
habitual in-
temperance,
&c.

Compromise
of suit.

Insanity.

not the respondent's, holding that the circumstance was irrelevant to the issue (*f*).

A separation deed executed by a husband and wife, containing a covenant by trustees for the wife not to sue her husband for restitution of conjugal rights, is, generally, a bar to such a suit by the wife (*g*).

But it was held otherwise where a husband, who had entered into a covenant to pay his wife 200*l.* a year, which he had not fulfilled, did not appear in the suit (*h*).

If an agreement for a separation between the parties has not been pleaded in a suit for restitution, it is not the duty of the Court to raise the point how far the petitioner's rights to a decree of restitution are affected by such agreement; nevertheless, if such decree is made the basis of subsequent proceedings, it is open to the Court to go into the whole matter (*i*).

In *D'Arcy v. D'Arcy* (*k*), an Irish case, it was held that violent and uncontrolled temper, habitual intemperance, violent conduct in the presence of the husband's guests, assaults on him, acts or threats of violence and offensive language and false and scandalous statements against his daughters, and acts of violence towards his servants, constituted a legal defence to a suit by the wife for restitution.

A wife who agrees, or authorizes her solicitor to agree, upon terms to stay proceedings in a suit instituted by her for restitution will be bound by such agreement (*l*).

Insanity is no answer to a suit for restitution, except

(*f*) *Mason v. Mason* (1889), 61 L. T. 304.

(*g*) *Clark v. Clark* (1885), 10 P. D. 188; 54 L. J. P. 57; 52 L. T. 234. See also *Marshall v. Marshall* (1879), 5 P. D. 19; 48 L. J. P. 49; 39 L. T. 640.

(*h*) *Tress v. Tress* (1887), 12 P. D. 128; 56 L. J. P. 93; 57 L. T. 501. See also *Kennedy v.*

Kennedy, (1907) P. 49; 76 L. J. P. 34; 96 L. T. 476.

(*i*) *Hardie v. Hardie* (1901), 70 L. J. P. 29; 84 L. T. 64.

(*k*) 19 L. R., Ir. 369.

(*l*) *Stanes v. Stanes* (1877), 3 P. D. 42; 47 L. J. P. 19; 39 L. T. 46. See also *Rowley v. Rowley* (1864), 33 L. J. P. 54.

where it is of such a nature as to render future cohabitation dangerous (*m*).

The Court will not dismiss a petition for restitution solely on the ground of delay in presenting the petition (*n*).

In *Russell v. Russell* (*o*), the wife persisted in bringing against her husband by word of mouth, and in letters written to members of his family and others, a charge of having committed an unnatural offence, the charge not being true, nor believed by her to be true. The Court of Appeal (Rigby, L. J., diss.) held that she had not been guilty of legal cruelty. At the same time it was held by the whole Court, that desertion of the wife by the husband was, in the circumstances, not desertion without cause entitling her directly to a judicial separation; and that since the passing of the Matrimonial Causes Act, 1884, the Court was not bound on refusing the husband's claim for judicial separation to grant the wife a decree for restitution of conjugal rights, and thus enable her to obtain a decree for judicial separation indirectly under section 5 of that Act.

The first portion of this judgment was affirmed on appeal to the House of Lords, but the second part—that is to say, so much of the judgment of the Court of Appeal as was unanimous—was not finally questioned (*p*).

And in the later case of *Oldroyd v. Oldroyd* (*q*), it was held in the Court below that the effect of the above

Defences to suit for restitution.

1895.

Unreasonable delay.

1895.

Conduct not amounting to legal cruelty may be answer to petition for restitution of conjugal rights.

1896.

Effect of *Russell v. Russell*.

(*m*) *Radford v. Radford* (1869), 20 L. T. 279; *Hayward v. Hayward* (1858), 1 S. & T. 81; 28 L. J. P. 9. See also on the subject of insanity as a defence, *Hanbury v. Hanbury*, (1892) P. 222; 61 L. J. P. 115; *Yarrow v. Yarrow*, (1892) P. 92; 61 L. J. P. 69; 66 L. T. 383.

(*n*) *Beauclerk v. Beauclerk* (1894), 71 L. T. 376.

(*o*) (1895) P. 315; 64 L. J. P. 105; 73 L. T. 295. For proceedings on a summons to strike out the answer in this case, see 71 L. T. 268.

(*p*) (1897) A. C. 395; 66 L. J. P. 122; 77 L. T. 249.

(*q*) (1896) P. 175; 65 L. J. P. 113; 74 L. T. 281. See also *Beer v. Beer* (1906), 94 L. T. 704.

Defences to
suit for
restitution.

—
Misconduct
of petitioner
leading to
desertion by
respondent.

decision appears to be, that in cases where the conduct of the petitioner has led to desertion by the respondent, and has amounted to sufficient cause to disentitle the petitioner to maintain a suit for judicial separation on the ground of desertion, the Court is now empowered to refuse to pronounce a decree of restitution of conjugal rights, although such misconduct on the part of the petitioner may not be sufficiently grave to enable the respondent to obtain a judicial separation.

The subject of this chapter is further dealt with in Part II. of this work, tit. "Practice in Suits for Restitution" (p. 414). See also "Costs," *post*, Chap. XVI. (p. 228).

CHAPTER V.

JACTITATION OF MARRIAGE.

JACTITATION of marriage is when one party "boasts or gives out that he or she is married to the other, whereby a common reputation of their matrimony may ensue."

The Court has power to decree perpetual silence against the jactitator, which was the only remedy the Ecclesiastical Courts could give for this injury (a).

Jactitation.

What is decree of perpetual silence.

The jurisdiction of the Ecclesiastical Courts in respect of these suits was transferred to the Divorce Court by section 6 of the Matrimonial Causes Act, 1857.

Mat. C. Act, 1857, s. 6.

In former editions of this work Mr. Browne says: "Suits for jactitation of marriage were of very familiar occurrence in the Ecclesiastical Courts of this country till the year 1776, when they were brought into disrepute by the celebrated trial of the Duchess of Kingston for bigamy before the House of Lords." He does not cite any authority for this statement, but it may certainly be taken as a fact that since the institution of the Divorce Courts these suits have been of very rare occurrence.

Duchess of Kingston's case.

In *In re Campbell v. Corley, Ex parte Campbell* (b), it was held that a suit for jactitation of marriage can *only* be brought by one of the parties to the pretended marriage.

Suit must be brought by one of the parties to the pretended marriage.

To the suit for jactitation of marriage there would seem to be three defences: (1) *a denial of the boasting*; (2) *setting up the fact of an actual marriage between the*

Defences. Denial. Actual marriage.

(a) See Black. Com., vol. 3, p. 93.

suit was brought in the Ecclesiastical Courts by the guardian of a minor, see *Butler v. Dolben* (1756), 2 Lee, 312.

(b) (1862), 31 L. J. P. 60. And for a case in which such a

Jactitation of marriage. *parties; (3) that the petitioner acquiesced in the boasting of the respondent (c).*

Acquiescence.

1892.

Trial by jury.

In the most recent case of jactitation of marriage there were two decisions of the Court of Appeal: (1) *that it is not the practice of the Court to order a suit of jactitation of marriage to be tried by a jury where the respondent has put in no defence (d);* and (2) *that the Court will not make a decree in a jactitation suit in favour of a petitioner who has at any time acquiesced in the assertion of the respondent that they were actually married (e).*

The subject of this chapter is further dealt with in Part II. of this work, tit. "Practice in Suits for Jactitation of Marriage" (p. 420).

(c) *Bodkin v. Case*, Milw. Ir. Ecc. Rep. 356.

(d) *Thompson v. Rourke*, (1892) P. 244; 61 L. J. P. 132; 67 L. T. 137.

(e) *Ib.*, (1893) P. 70; 62 L. J. P. 46; 67 L. T. 788; 1 R. 501; *Hawke (Lord) v. Corri (calling herself Lady Hawke)* (1820), 2 Hagg. Cons. R. 280, discussed and approved.

CHAPTER VI.

NULLITY OF MARRIAGE.

As in suits for judicial separation so also in suits for nullity, by the provisions of section 22 of the Matrimonial Causes Act, 1857 (*a*), the Divorce Division is bound by the principles acted upon by the older Ecclesiastical Courts, and the decisions of those Courts are therefore still of value.

All legal presumptions are in favour of the validity of a marriage (*b*). If by law a marriage was null and void *ab initio*, lapse of time neither is nor ought to be a bar to the inquiry (*c*), though relief in suits for nullity is not accorded unless the petitioner is reasonably prompt in seeking it (*d*).

There is no actual limit of age at which the right to a decree of nullity ceases (*e*), though the Ecclesiastical Courts sometimes refused to proceed where the parties were of advanced age (*f*).

A suit for nullity cannot be entertained after a decree of separation by reason of adultery (*g*). Neither can a

Nullity.
General observations.
Mat. C. Act, 1857, s. 22.
Ecc. Courts, Court bound by principles of.
Presumption in favour of marriage.
Lapse of time.

Age of parties.

Decree of separation for adultery.

(*a*) *Ante*, p. 61.

(*b*) *Catterall v. Sweetman* (*falsely calling herself Catterall*) (1845), 1 Robert. 304. See also *Shephard, In re*; *George v. Thyer*, (1904) 1 Ch. 456; 73 L. J. Ch. 401; 90 L. T. 249; where the presumption was held to arise from the parties having lived together as man and wife for a considerable time.

(*c*) *Duins v. Donovan* (1830), 3 Hagg. 304.

(*d*) *M. v. C. or Mansfield* (*falsely called Cuno*) v. *Cuno* (1873), L. R., 2 P. & D. 414; 41 L. J. P. 37; 26 L. T. 321.

(*e*) *Williams v. Homfray* 2 S. & T. 240; 30 L. J. P. 73; 4 L. T. 89.

(*f*) *Briggs v. Morgan* (1820), 2 Hagg. Con. C. 324; 3 Phill. 325.

(*g*) *Guest v. Shipley* (*falsely calling herself Guest*) (1820), 2 Hagg. Con. C. 321.

Nullity.
 —
 Marriages
 voidable but
 not void.
 Burden of
 proof.
 Marriage,
 what is.

Polygamy,
 Mormon
 marriage.

Japanese
 marriage.

Matter of
 status as well
 as contract.

Opinion of
 Sir James
 Hannen in
Sottomayor v.
De Barros.

marriage voidable, but not void *ab initio*, be questioned after the death of either party (*h*).

In suits for nullity the burden of proof is on the party seeking to impugn the marriage (*i*).

The word "marriage," as understood in the English Court, means the voluntary union for life of one man and one woman to the exclusion of all others, as understood in Christian countries. Therefore the Court will not recognize as a valid marriage one contracted in a country where polygamy is lawful, between a man and a woman who profess a faith which allows polygamy, such as that of the Mormons (*k*).

But the Court recognized a marriage as valid between a British subject and a Japanese woman, duly solemnized in Japan, polygamy being illegal in that country (*l*).

Marriage is something more than an ordinary contract. Speaking on this point, in *Sottomayor (otherwise De Barros) v. De Barros* (Queen's Proctor intervening (*m*)), Sir James Hannen says: "It is indeed based upon the contract of the parties, but it is a status arising out of a contract to which each country is entitled to attach its own conditions, both as to its creation and duration."

In 1908 the Court of Appeal decided the case of *Ogden v. Ogden (otherwise Philip)* (*mm*). In this case a ceremony

(*h*) *P. v. S.* (1868), 37 L. J. P. 80; 19 L. T. 22; *A. v. B. and Another* (1868), L. R., 1 P. & D. 559.

(*i*) *Cuno v. Cuno* (1872), L. R. 2 H. L. Sc. Ap. 300; 29 L. T. 316. See also *Shephard, In re; George v. Thyer*, (1904) 1 Ch. 456; 73 L. J. Ch. 401; 90 L. T. 249.

(*k*) *Hyde v. Hyde and Woodmansee* (1866), L. R., 1 P. & D. 130; 35 L. J. P. 57; 14 L. T. 188; *Warrender v. Warrender*

(1835), 2 Cl. & Fin. 488; *In re Bethell, Bethell v. Hildyard* (1888), 38 Ch. D. 220; 57 L. J. Ch. 487; 58 L. T. 674.

(*l*) *Brinkley v. Attorney-General* (1890), 15 P. D. 76; 59 L. J. P. 51; 62 L. T. 911.

(*m*) (1877), 3 P. D. 1; 47 L. J. P. 23; 37 L. T. 415; (1879), 5 P. D. 94; 49 L. J. P. 1; 41 L. T. 281.

(*mm*) (1908) P. 46; 77 L. J. P. 34; 97 L. T. 827.

of marriage was celebrated in England between a domiciled Englishwoman and P., a domiciled Frenchman. By a decree of a French Court the marriage was annulled on the ground that the consent of the parent had not been obtained. P. subsequently married a Frenchwoman in France. The Englishwoman then instituted a suit in England for dissolution of her marriage with P. on the ground of his adultery and desertion. This suit was dismissed for want of jurisdiction. The Englishwoman then went through a ceremony of marriage in England with O., a domiciled Englishman, describing herself as a widow. It was held by the Court of Appeal (following *Simonin v. Mallac* (n) and *Sottomayor v. De Barrós*) that the *lex loci contractûs* must prevail, and that the later marriage was bigamous and must be annulled.

Nullity.
—

Subject to certain reservations, it may be taken as a well-recognized proposition of law that any marriage will be held valid by the English Matrimonial Court which has been properly solemnized according to the *lex loci contractûs*, provided always the parties were at the time capable of contracting marriage (o).

Lex loci contractûs.

Capacity to contract marriage.

The mode of entering into the marriage contract in England has been dealt with by a variety of statutes, of which the following are the most important, and some of which are printed in the Appendix to this book:—

Marriage Acts.

4 Geo. 4, c. 76 and 6 & 7 Will. 4, c. 85, amended the

4 Geo. 4, c. 76; 6 & 7 Will. 4, c. 85;

(n) (1860), 2 S. & T. 67; 29 L. J. P. 97; 2 L. T. 327.

93; *S. C.*, 3 Sm. & G. 481; 27 L. J., Ch. 401; *Fenton v. Livingstone* (1859), 3 Macq. H. L. Cas. 497; *R. v. Brampton (Inhabitants)* (1808), 10 East, 282; *Shaw v. Att.-Gen.* (1870), L. R., 2 P. & D. 156; 39 L. J. P. 81; 23 L. T. 322; *Alison, In re* (1874), 31 L. T. 688; *Rooker v. Rooker and Newton* (1863), 3 S. & T. 526; 33 L. J. P. 42. See also *Herbert v. Herbert* (1819), 3 Phill. 58.

(o) *Kent v. Burgess* (1840), 11 Sim. 361; 5 Jur. 166; *Lacon v. Higgins* (1822), 3 Stark. 178; D. & R., N. P. C. 38; *Lautour (Ann) and Others v. Teesdale (Christopher) and Wife (Barbara Ann)* (1816), 8 Taunt. 830; 2 Marsh. 243; *Brook and Others (Appellants) v. Brook and Others and Att.-Gen. (Respondents)* (1861), 9 H. L. Cas. 193; 4 L. T.

Nullity. law relating to marriages in England generally. 12 & 13 Vict. c. 68 and 31 & 32 Vict. c. 61 facilitate marriages of British subjects resident in foreign countries, and establish the validity of certain consular marriages which were in doubt. 23 Vict. c. 18 and 35 Vict. c. 10 relate to the marriages of Quakers; and the Registration Acts, 6 & 7 Will. 4, c. 86 and 19 & 20 Vict. c. 119, provide (*inter alia*) for civil marriage at the different registry offices. 42 & 43 Vict. c. 29 removes doubts as to the validity of certain marriages of British subjects on board her Majesty's ships. 47 & 48 Vict. c. 20 establishes the validity of certain marriages of members of the Greek Church in England; and 49 Vict. c. 3 and 51 & 52 Vict. c. 23, remove doubts concerning the validity of certain other marriages; whilst 49 Vict. c. 14 extends the hours within which marriage may be lawfully solemnized to 3 p.m.

52 & 53 Vict. c. 38. In 1889, "An Act to remove doubts as to the validity of certain marriages solemnized in Basutoland and British Bechuanaland," or, shortly, "The Basuto and British Bechuanaland Marriage Act, 1889" (52 & 53 Vict. c. 38), and in 1890 and 1891 two statutes, numbered respectively 53 & 54 Vict. c. 47 and 54 & 55 Vict. c. 74, relating to foreign marriages. Both these statutes, however, are repealed by the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), entitled "An Act to consolidate enactments relating to the marriage of British subjects outside the United Kingdom" (*p*).

Marriage Act, 1898. The Marriage Act, 1898 (61 & 62 Vict. c. 58), permits marriages to be celebrated in Nonconformist chapels, subject to certain conditions, without the presence of a registrar. The Marriage Act, 1899 (62 & 63 Vict. c. 27), removes doubts as to the validity of certain marriages in England and Ireland where one of the parties has not been resident in the same country as the other, and there

(*p*) See Renton & Phillimore's "Comparative Law of Marriage and Divorce."

have been certain irregularities in the publication of banns; and the Marriages Legalization Act, 1901 (1 Edw. 7, c. 23), and the Marriages Legalization Act, 1903 (3 Edw. 7, c. 26), legalize and render valid marriages already solemnized in certain chapels and places as to which some doubt had previously existed.

Nullity.
Marriages
Legalization
Acts, 1901,
1903.

To render a marriage legal (if contracted in England), it is requisite, unless the parties to it are either Jews or Quakers, in whose favour special statutory provisions have been enacted (*q*), that it should be solemnized by a duly ordained clergyman of the Established Church, or by some duly authorized person under the Marriage Act, 1898, after due publication of banns, or after the parties have obtained a *Special Licence*, an *Ordinary's Licence*, a *Superintendent-Registrar's Licence*, or a *Superintendent-Registrar's Certificate* authorizing its celebration.

Requisites for
a valid
marriage
when
solemnized
in England.

Banns.
Licence.

Further, it must be solemnized in a *Parish Church* or public *Chapel*, or the Superintendent-Registrar's Office, or in some other *building registered* for the solemnization of marriages, except when solemnized by special licence.

Established
Church or
public chapel
or other
registered
building,
unless by
special
licence.

A legal marriage can only be contracted by single persons—under which term are included widowers, widows, and divorced persons—not being within the prohibited degrees of *consanguinity* or *affinity*, both of whom are *consenting* and of sound mind, and able to perform the duties of matrimony.

Freedom to
contract.
Consent.
Sound mind.

The following extract is from "Dicey's Conflict of Laws," 2nd ed. p. 613:—

Extract from
"Dicey on
Conflict of
Laws."

"Rule 172. Subject to the exceptions hereinafter mentioned, a marriage is valid when—

"(1) each of the parties has, according to the law of

(*q*) But all exceptions in favour of Jews and Quakers relate only to formalities, not essentials. Therefore a marriage between two Jews (an uncle and niece) was held invalid, though

valid both by Jewish law and by the law of the place where it was contracted: *De Wilton, In re; De Wilton v. Montefiore*, (1900) 2 Ch. 481; 69 L. J. Ch. 717; 83 L. T. 70.

Nullity.
 Extract from
 "Dicey's
 Conflict of
 Laws."

his or her respective domicile, the capacity to marry the other, and,

"(2) any one of the following conditions as to the form of celebration is complied with (that is to say):—

"(i) if the marriage is celebrated in accordance with the local form; or,

"(ii) if the parties enjoy the privilege of ex-territoriality, and the marriage is celebrated in accordance with any form recognized as valid by the law of the State to which they belong; or,

"(iii) if the marriage (being between British subjects) is celebrated in accordance with the requirements of the English common law in a country where the use of the local form is impossible; or,

"(iv) if the marriage is celebrated in accordance with the provisions of and the form required by the Foreign Marriage Act, 1892, s. 22, within the lines of a British army serving abroad; or,

"(v) if the marriage, being between parties, one of whom at least is a British subject, is celebrated outside the United Kingdom in accordance with the provisions of, and the form required by, the Foreign Marriage Act, 1892, by or before a marriage officer (such, for example, as a British ambassador or British consul), within the meaning of, and duly authorized to be a marriage officer under, the said Act."

In this rule and the following rule the term *marriage* means "the voluntary union for life of one man and one woman to the exclusion of all others" (r).

(r) *Hyde v. Hyde and Woodmansee* (1866), L. R., 1 P. & D. 130; 35 L. J. P. 57; 14 L. T. 188; and *Brinkley v. Att.-Gen.* (1890), 15 P. D. 76; 59 L. J. P. 51; 62 L. T. 911.

Nullity.

“*Exception 1.*—A marriage is not valid if either of the parties, being a descendant of George II., marries in contravention of the Royal Marriage Act (12 Geo. 3, c. 11).

“*Exception 2.*—A marriage is, possibly, not valid if either of the parties is, according to the law of the country where the marriage is celebrated, under an incapacity to marry the other.

“Rule 173. Subject to the exceptions hereinafter mentioned, no marriage is valid which does not comply, as to both (1) the capacity of the parties, and (2) the form of the marriage, with Rule 172.

“*Exception 1.*—The validity of a marriage celebrated in England between persons of whom the one has an English, and the other a foreign domicile is (possibly) not affected by any incapacity which, though existing under the law of such foreign domicile, does not exist under the law of England.

“*Exception 2.*—A marriage celebrated in England is not invalid on account of any incapacity which, though imposed by the law of the domicile of both or of either of the parties, is of a kind to which our Courts refuse recognition (s).

“*Exception 3.*—Any marriage is valid which is made valid by Act of Parliament.”

All such requisites as “banns,” “licences,” &c., &c., are *formal*, and a marriage is void only when they are deficient, and known to be wanting by both parties to the marriage (t). On the other hand, all such requisites as being free to contract, not being within the prohibited degrees of *consanguinity* or *affinity*, *consent*, *mental com-*

Requisites
for a valid
marriage.

(s) This passage is cited with approval by Lord Hannen in his judgment in *Sottomayor (otherwise De Barros) v. De Barros*,

post, p. 103.

(t) *Rex v. Wroxtton (Inhabitants)* (1833), 4 B. & Ad. 641; 1 N. & M. 712.

Nullity.
—

petence, physical capacity to perform the duties of matrimony, &c., are essential, and the marriage is void by English law, wherever solemnized, whenever they are wanting, if the parties to it are domiciled in England. And this is so, although the marriage may be perfectly legal in the country in which it was solemnized (*u*).

Statutes
relating to.
How inter-
preted.

But in interpreting statutes relative to marriage and its formalities mere prohibitory words have never been held to create a nullity, unless that nullity is declared in the Act; and the Acts of colonial legislatures, where the English law prevails, must be governed by the same rules of construction as prevail in England (*x*).

Marriage
contracted by
foreigners in
England to
evade laws of
their own
country.

In *Simonin (falsely called Mallac) v. Mallac* (*y*) the parties were French people, domiciled in France. Being unable to contract legal marriage in France without the consent of their parents, they came to England, where their marriage was duly solemnized. They were in every way capable of contracting marriage in this country. The Court decided that the marriage could not be held null and void merely because the parties contracted it in England, in order to evade the laws of their country.

Portuguese
subjects.
Marriage of
first cousins.

In *Sottomayor (otherwise De Barros) v. De Barros* (*z*) the parties, who were first cousins, were duly married in England according to the laws of this country. But they were Portuguese subjects, and by the law of Portugal the marriage of first cousins is illegal without a Papal dispensation, which they had not obtained. The Court of Appeal (reversing the decision of Sir R. Phillimore) held

(*u*) See *Brook and Others (Appellants) v. Brook and Others and Att.-Gen. (Respondents)* (1861), 9 H. L. Cas. 193; *Fenton v. Livingstone* (1859), 3 Macq. H. L. Cas. 497; *In the Goods of Mette, Mette v. Mette* (1859), 1 S. & T. 416; 28 L. J. P. 117; *Miles v. Chilton (falsely calling*

herself Miles) (1849), 1 Robert. 697.
(*x*) *Catterall v. Sweetman (falsely calling herself Catterall)* (1845), 1 Robert. 317.
(*y*) (1860), 2 S. & T. 67; 29 L. J. P. 97; 2 L. T. 327.
(*z*) (1877), 3 P. D. 1; 47 L. J. P. 23; 37 L. T. 415.

that the marriage was null and void on that ground, provided always both the parties were actually domiciled in Portugal at the time of such marriage.

Nullity.

As, however, there was some doubt as to the domicile of the parties at the time of the marriage, the case was referred back to the Court below on this point. There it came before the President (Sir James Hannen), who, in the course of his judgment, expressed his strong disapproval of, and disagreement with, the view taken by the Court of Appeal (a).

Question of domicile referred by Court of Appeal to Court below.

In *Ogden v. Ogden* (or *Philip*) (b) the facts were as follows:—In 1908 a domiciled Englishwoman had married in England a domiciled Frenchman named Philip, temporarily residing in England. By a decree of the French Court in November, 1901, this marriage was annulled, on the ground that the consent of the parent, as required by French law, had not been obtained. Philip subsequently married a Frenchwoman in France. In 1903, the Englishwoman instituted a suit in England for the dissolution of her marriage with Philip, on the ground of his adultery and desertion. This suit was dismissed for want of jurisdiction. In 1904 the Englishwoman went through a ceremony of marriage in England with Ogden, a domiciled Englishman, describing herself as a widow. Mr. Justice Bargrave Deane held, following *Simonin v. Mallac* and *Sottomayor v. De Barros*, that the *lex loci contractûs* must prevail, and that this latter marriage was bigamous and must be annulled at the suit of Ogden, and the Court of Appeal affirmed this decision.

(a) *Sottomayor* (otherwise *De Barros*) v. *De Barros* (Queen's Proctor intervening) (1879), 5 P. D. 94; 49 L. J. P. 1; 41 L. T. 281. The following authorities were quoted by Sir James Hannen: *Male v. Roberts* (1790),

3 Esp. 163; *Scrimshire v. Scrimshire* (1732), 2 Hagg. Cons. C. 412; *Simonin* (falsely called *Mallac*) v. *Mallac*, *supra*; and *Mette v. Mette*, *supra*.

(b) (1908) P. 46; 77 L. J. P. 34; 97 L. T. 827.

Nullity.

A foreigner or a British subject domiciled abroad, who, being in England, contracts in due form, according to the law of England, a marriage with a woman domiciled in England, is not to be permitted to assert that he was under the burden of an incapacity, imposed by the law of the foreign domicile, to do that, which he in fact did voluntarily, and he cannot repudiate the marriage on the ground of such personal incapacity (c).

Residence,
not domicile,
test of juris-
diction in
suits for.

In suits for nullity, residence and not domicile is the test of jurisdiction. So the Court pronounced a decree where the domicile of the parties was Irish and the marriage took place in the Isle of Man (d).

Ground of
nullity must
exist at time
of marriage.

The only grounds for a petition for nullity are such as existed at the time of the marriage, as no impediment supervening afterwards will suffice (e).

Who may
petition for
nullity.

Any person having a sufficient interest in annulling a marriage may commence proceedings for nullity (f), unless the validity of the marriage be disputed on the ground of impotence, in which case the suit can only be preferred by the person who suffers an injury from it (g).

Grandfathers
and grand-
mothers.

A father or a mother (if she be a widow), or grandfathers and grandmothers who, under 43 Eliz. c. 7, may be called upon to maintain a pauper grandchild, have a sufficient interest to institute a suit to annul a child's or grandchild's marriage (h).

(c) *Chetti (Venugopal) v. Chetti (Venugopal)*, (1909) P. 67; 78 L. J. P. 21; 99 L. T. 885.

(d) *Roberts (otherwise Brennan) v. Brennan*, (1902) P. 143; 71 L. J. P. 74; 86 L. T. 599.

(e) *Brown v. Brown* (1828), 1 Hagg. E. R. 524.

(f) See *Bowzer v. Ricketts* (1795), 1 Hagg. Con. C. 213; *Tree v. Quin* (1812), 2 Phill. 14; *Sherwood v. Ray* (1837), 1 Moo.

P. C. C. 396; *Wells v. Cottam (falsely called Wells)* (1863), 3 S. & T. 364; 33 L. J. P. 41; 10 L. T. 138; *Faremouth and Others v. Watson* (1811), 1 Phill. 355; *Maynard v. Hazelrigge* (1790), cited in *Chichester v. Donegal* (1822), 1 Add. 16.

(g) *P. v. S.* (1868), 37 L. J. P. 80; 19 L. T. 22.

(h) *Beavan v. McMahon* (1859), 2 S. & T. 58; 28 L. J. P. 127; 2 L. T. 255.

As we have already seen, one of the *first* preliminaries required for every marriage is either—

1. Special Licence; or
2. Ordinary's Licence; or
3. Banns; or
4. Licence of Superintendent-Registrar; or
5. Certificate of Superintendent-Registrar (*i*).

Nullity.
Formal
requisites
for a valid
marriage.

The distinction between a special licence and an ordinary one is, that by the former only the parties may be married at any time in any church or chapel or *other meet and convenient place*; it is granted by the Archbishop of Canterbury alone (*k*), and his proper officers; and is issued from the Faculty Office, Knightrider Street, Doctors' Commons (*l*).

Special
licence.
Where
granted.

Licences are granted by the Archbishops of Canterbury and York, according to their rights, and the several other bishops, for the marriage of persons within their respective dioceses, one of whom shall be resident at the time within the diocese of the bishop in whose name such licence shall be granted. The surrogate is the substitute for the chancellor or other officer of the diocese.

Ordinary's
licence; who
may grant.

A licence is a legal authority for marriage, and a minister may not refuse to marry pursuant to a proper licence from his ordinary unless he suspects fraud (*m*).

Minister
bound to
marry.

But by section 57 of the Matrimonial Causes Act, 1857, a clergyman of the Established Church may refuse to "solemnize the marriage of any person whose former marriage may have been dissolved on the ground of his or her adultery."

Conscience
clause in
Divorce Act.

(*i*) For further particulars as to the preliminaries requisite for a legal marriage in England, see Renton & Phillimore's "Comparative Law of Marriage and Divorce," Chap. III.

(*k*) 4 Geo. 4, c. 76, s. 20; 6 & 7 Will. 4, c. 85, s. 1; 25 Hen. 8.

(*l*) See Renton & Phillimore's "Comparative Law of Marriage and Divorce," p. 181.

(*m*) *Argar v. Holdsworth* (1758), 2 Lee, 515.

- Nullity. A marriage is valid, though celebrated without banns or licence first had and obtained, unless both parties were aware of the irregularity at the time of the ceremony (*n*).
- Marriage without licence or banns. By the Act of 4 Geo. 4, c. 76, s. 14, no licence shall be granted unless one of the parties shall personally swear before the surrogate, &c. that he or she believes there is no impediment of kindred or other lawful cause, and that one of the parties has had his or her usual place of abode within the parish within which the marriage is to be solemnized for the space of fifteen days immediately preceding; and if one of the parties, not being a widower or widow, be a minor, that the consent of the person whose consent is required (for which see sections 16 and 17) has been obtained, or that there is no such person. By section 19, the marriage must be solemnized within three months of the grant of this licence; otherwise a new one must be obtained.
- Oath to be taken before surrogate as to certain particulars before licence is granted.
- Consent required.
- Time within which marriage must be celebrated.
- As to fifteen days' residence. By section 26, the fifteen days' residence is to be taken as proved, and no evidence to the contrary can be received in any suit touching the validity of the marriage.
- Want of consent of parents, &c. Neither the want of the fifteen days' residence, nor the want of the consent of the party whose consent is required by the 17th section, will vitiate a marriage (*o*); but if a false oath be taken for the purpose of obtaining a licence, it is punishable as a misdemeanour (*p*).
- Archbishop's Court cannot entertain suit against layman with respect to marriage licence. But the Archbishop's Court of Canterbury has no jurisdiction over a layman for falsely swearing before a surrogate an affidavit to lead to the issue of a marriage licence (*q*).
- (*n*) *Greaves v. Greaves* (1872), L. R., 2 P. & D. 423; 41 L. J. P. 66; 26 L. T. 745. And as to a marriage solemnized without fraud, under a licence given by an unauthorized person, see *Balfour v. Carpenter* (1810), 1 Phill. 207.
- (*o*) *R. v. Birmingham (Inhabitants)* (1828), 8 B. & C. 29; 2 M. & R. 230.
- (*p*) *R. v. Chapman* (1849), 1 Den. C. C. 432.
- (*q*) *Phillimore v. Machon* (1876), 1 P. D. 481.

By section 22, “ . . . if any persons . . . shall knowingly and wilfully intermarry without due publication of banns (*r*) or licence . . . the marriages of such persons shall be null and void to all intents and purposes whatsoever”; but both of the parties must knowingly and wilfully consent to such informal solemnization to avoid the marriage (*s*).

Nullity.

Informality.
Marriage without banns or licence knowingly and wilfully.

So it has been held that a marriage is not null and void on the ground of informality: where it was solemnized the day before licence granted, the wife being ignorant of the fact (*t*); where a licence has been obtained by fraud unless both parties are cognizant of the fraud (*u*); where a wife has imposed on her husband a false description of her name and condition (*x*); where persons have obtained licences in names which they had assumed (*y*).

Knowledge of informality by both parties necessary to invalidate marriage.

A partial departure from the true name of one of the parties to a marriage in a licence obtained in the altered name by the other party for the purpose of concealing the intended marriage is no ground for nullity if the altered name may represent the person, and if such licence was obtained for and by the direction of such person (*z*); nor if a party has been by mistake described in the licence as having two additional Christian names (*a*).

Partial misdescription in licence.

Parties wrongly described in licence.

It was held in the Ecclesiastical Courts that no disparity of fortune or mistake as to the qualities of the person would impeach the *vinculum* of the marriage (*b*); and that

Disparity of fortune, &c.

(*r*) On the subject of banns, see “Hammick’s Marriage Laws of England,” pp. 64—80.

(*s*) *Rex v. Wroxtton (Inhabitants)* (1833), 4 B. & A. 640.

(*t*) *Greaves v. Greaves* (1872), L. R., 2 P. & D. 423; 41 L. J. P. 66; 26 L. T. 745.

(*u*) *Clowes v. Jones (falsely calling herself Clowes)* (1842), 3 Curt. 193.

(*x*) *Ib.* 185.

(*y*) *Cope v. Burt (falsely calling herself Cope)* (1809), 1 Hagg. Con. C. 434.

(*z*) *Beavan v. McMahon* (1859), 2 S. & T. 230; 30 L. J. P. 61; 3 L. T. 820.

(*a*) *Haswell v. Haswell and Gilbert* (1881), 51 L. J. P. 15.

(*b*) *Ewing (falsely called Wheatley) v. Wheatley* (1814),

Nullity.
 Mock
 clergyman.
 Fraud in
 inducement.

it was questionable whether a marriage effected by imposing on an innocent party a pretended clergyman, and *supposititious licence*, would not bind the guilty party (c).

And more recently it has been held that the Court of Divorce has no power to pronounce a decree of nullity of marriage, or to dissolve a marriage, because of fraud in its inducement (d).

Marriages
 after three
 months from
 publication
 of banns.

Although 4 Geo. 4, c. 76, s. 9, requires marriages by banns to be solemnized within three months after the complete publication of banns, a marriage will not be held invalid because the parties have married after the prescribed time if they have not done so knowingly and wilfully (e).

Marriages
 held valid
 in spite of
 irregular
 publication
 of banns.

In the following cases the marriages have been upheld in spite of irregularities in the publication of banns.

Assumed
 name gene-
 rally used.
 "Spinster"
 instead of
 "widow."

Where the name given has been assumed by the party so long, or under such circumstances, that it has for all practical purposes superseded his or her real name (f). Where a woman was published as "*widow*" when she ought to have been published as "*spinster*," and also by a wrong name, *there being no fraud* (g); and where ille-

Published in
 wrong name,
 but no fraud.

2 Hagg. Con. C. 175; *Wakefield v. Mackey* (1807), 1 Phill. 134 (notis).

(c) *Hawke v. Corri* (calling herself *Lady Hawke*) (1820), 2 Hagg. Con. C. 288.

(d) *Templeton v. Tyree and Templeton* (falsely called *Tyree*) (1872), L. R., 2 P. & D. 420; 41 L. J. P. 86; 27 L. T. 429. In the course of his judgment in this case, Lord Penzance cited *Rex v. Wroxton* (Inhabitants) (1833), 4 B. & A. 641; 1 N. & M. 712; *Tongue v. Allen* (1835), 1 Curt. 38; *Wright v. Elwood* (falsely calling herself *Wright*)

(1837), 1 Curt. 49, 662. See also *Gompertz v. Kensit* (1872), L. R., 13 Eq. Cas. 369; 26 L. T. 95.

(e) *Reg. v. Clarke* (1867), 10 Cox, C. C. 474; 16 L. T. 429.

(f) *Diddear* (falsely called *Faucit*, otherwise *Savill*) v. *Faucit* (1821), 3 Phill. 580; *Rex v. St. Faith's, Newton* (Inhabitants) (1823), 3 D. & R. 348; *Rex v. Billinghamurst* (Inhabitants) (1814), 3 M. & S. 250; but see *Rex v. Tibshelf* (Inhabitants) (1830), 1 B. & Ad. 190.

(g) *Mayhew v. Mayhew* (1812), 2 Phill. 11.

gitimate children have been published by the name of either parent (*h*); and where a petitioner, having obtained a decree dissolving her marriage with the respondent, subsequently re-married him after publication of banns, in which she was described by her married name, she having in the interval usually passed by her maiden name (*i*).

Nullity.

By 4 Geo. 4, c. 76, s. 16, the consent of parents and guardians is required to the marriage of a minor, "unless there shall be no person authorized to give such consent" (*k*).

Minor,
consent to
marriage of.

Though 4 Geo. 4, c. 76, s. 2, requires banns to be published "according to the rubric prefixed to the office of matrimony in the Book of Common Prayer," this part of the Act has always been considered to be directory. Neither is it necessary the actual words of the service should have been followed; but the ceremonies required by law, such as the publication of banns and the like, being complied with, when the hands of the parties are joined together, and the clergyman pronounces them to be man and wife, if they understand that by that act they have agreed to cohabit together and with no other person, they are married (*l*).

Banns to be
published
according to
rubric in
Book of
Common
Prayer,
4 Geo. 4,
c. 76, s. 2.

The statutory and rubrical provisions, which require that two witnesses should be present at a marriage, and should sign the register, are merely directory. A marriage solemnized in the presence of one witness only is therefore a good marriage (*m*).

Witnesses to
marriage.

In the following cases the marriages have been held

Marriages
held null

(*h*) See *Wakefield v. Mackey* (1807), 1 Phill. 134 (notis); *Sullivan v. Sullivan* (falsely called *Oldacre*) (1818), 3 Phill. 45.

L. R., 1 P. & D. 523; 37 L. J. P. 58; 18 L. T. 770.

(*i*) *Fendall* (otherwise *Goldsmid*) *v. Goldsmid* (1877), 2 P. D. 263; 46 L. J. P. 70.

(*l*) *Harrod v. Harrod* (1854), 1 K. & John. 4; 18 Jur. 853, in which case the parties were deaf and dumb.

(*k*) But see *Holmes v. Simmons* (falsely called *Holmes*) (1868),

(*m*) *Wing v. Taylor* (falsely calling herself *Wing*) (1861), 2 S. & T. 278; 30 L. J. P. 258; 4 L. T. 583.

Nullity.

and void on
ground of
undue pub-
lication of
banns.

Absolutely
wrong names.

No banns ever
published.

null and void on the ground that there has been an undue publication of banns with the knowledge and consent of both parties.

Where the banns have been published in absolutely wrong names (*n*); where the man was published by his Christian name only instead of by his Christian and surname (*o*); where names have been added that did not belong to the parties (*p*); where names have been omitted that did belong to the parties (*q*); where an illegitimate daughter has been published by a name that no longer belonged to her mother, and as the daughter of her mother's brother (*r*); and where parties have been married without any publication of banns at all (*s*).

In every case
irregularities
consented to
by parties.

In some of the cases above cited there was apparently no intention to deceive anyone, and no one was deceived by the undue publication; but in every case the irregularity was committed with the knowledge and by the consent of the parties to the marriage.

Marriage by
Superintend-
ent-Regis-
trar's licence
or certificate.

We pass next to the consideration of marriages solemnized by virtue of a Superintendent-Registrar's licence or certificate, the issuing of which is regulated by the following statutes:—6 & 7 Will. 4, c. 85; 1 Vict. c. 22; 3 & 4 Vict. c. 72; and 19 & 20 Vict. c. 119; commonly known as the Registration Acts, which were passed for

(*n*) *Brealy (falsely called Reed) v. Reed* (1841), 2 Curt. 833; *Pouget v. Tomkins* (1812), 1 Phill. 499; *Meddowcroft v. Gregory (falsely called Meddowcroft)* (1816), 2 Phill. 365; *Wormald v. Neale and Wormald (falsely called Neale)* (1868), 19 L. T. 93.

(*o*) *Midgley (falsely called Wood) v. Wood* (1861), 30 L. J. P. 57.

(*p*) *Green (falsely called Dalton) v. Dalton* (1822), 1 Add. 289; *Tree v. Quin* (1812), 2

Phill. 14; *Dobbyn v. Corneck*, Ib. 102.

(*q*) *Wiltshire v. Prince* (1830), 3 Hagg. 332; *Fellowes (falsely called Stewart) v. Stewart* (1814), 2 Phill. 240; *Stanhope v. Baldwin (otherwise Gosster; falsely called Stanhope)* (1822), 1 Add. 93; *Tongue v. Tongue* (1836), 1 Moore, P. C. C. 90.

(*r*) *Tooth v. Barrow* (1854), 1 Ecc. & Add. 371.

(*s*) *Wright v. Elwood (falsely calling himself Wright)* (1837), 1 Curt. 662.

the purpose (*inter alia*) of facilitating purely civil marriages.

Nullity.

Superintendent-Registrar's licence or certificate.

These statutes provide for marriages either by the Superintendent-Registrar's licence, or, without his licence, on his certificate issued after due notice. The former method is the more expensive, and is analogous to marriage by the ordinary's licence; the latter is the less expensive, and is analogous to marriage by banns. The formalities necessary for obtaining the Superintendent-Registrar's licence or certificate will be easily found by reference to the Acts themselves, which, together with the marginal notes, are printed in full in the Appendices to this volume (*t*).

A man may change his name by use and reputation, and if by use and reputation he has acquired a new name, he is not indictable under 19 & 20 Vict. c. 19, s. 2, for using a new name in signing a notice for the purpose of procuring his marriage under 6 & 7 Will. 4, c. 85 (*u*). In an Irish case decided in 1890, a Catholic priest celebrated a marriage between a Catholic and a Protestant—according to the rites of the Catholic Church—at 4 o'clock p.m. in the sacristy of a Catholic chapel, in the presence of two witnesses, but with closed doors. No notice was given to the registrar, nor certificate issued by him in accordance with section 38 of 33 & 34 Vict. c. 110, an Irish Marriage Act. There was no evidence of any intention on either side to contract a sham marriage, or that the parties had knowingly and wilfully disregarded the statutory formalities. The Irish Court of Appeal

New name acquired by reputation.

Mixed marriage in Ireland in sacristy of chapel; closed doors.

Irish Marriage Act, 33 & 34 Vict. c. 110.

(*t*) See also "Hammick's Marriage Laws of England," p. 136. See also, as to "due notice," *Holmes v. Simmons (falsely called Holmes)* (1868), L. R., 1 P. & D. 523; 37 L. J. P. 58; 18 L. T. 770; and *Prowse v. Spurway and Bowley (otherwise Spurway)* (1877), 46 L. J. P.

49; and as to necessity of both parties being privy to a false notice to invalidate it, see *Reg. v. Rea* (1872), L. R., 1 C. C. R. 365; 41 L. J., M. C. 92; 26 L. T. 484.

(*u*) *Reg. v. Smith* (1867), 4 F. & F. 1099.

Nullity.

refused to allow one of the contracting parties to dispute the validity of the marriage (*x*).

Licences by
virtue of the
Consular
Marriage
Acts.

Marriage in
England.
From 1756
to 1837.

As to licences granted by a consul (or person acting for him) in any foreign country, see 12 & 13 Vict. c. 68, and 31 & 32 Vict. c. 61, *post*, Appendix (*y*).

For some seventy years after the coming into operation of the "Act for the better preventing of clandestine marriages" (26 Geo. 2, c. 33), which was passed to put a stop to the solemnization of marriages in the Fleet and other irregular places, it was (with two exceptions) necessary to a valid marriage *in England* that it should be solemnized by an ordained clergyman of the Church of England, and, unless by special licence, in some duly authorized place of worship belonging to the establishment. The exceptions were when both parties to the marriage were either Quakers or Jews, in which case they were allowed the special privilege of being married by their own officers, according to their own peculiar usages (*z*). Persons of any other creed, whether Catholic or Protestant, if they desired to contract a valid marriage *in England*, could only do so by going to the State Church and being married by the State clergyman.

Where it
could be
celebrated.

Registration
Act,
6 & 7 Will. 4,
c. 85.

This obligation, often galling and offensive to the consciences of individuals, was at last removed by the earliest of the Registration Acts (6 & 7 Will. 4, c. 85), which, besides providing a method of purely civil marriage, first enabled Catholics as well as Dissenters to be married by their own ministers in their own places of worship,

(*x*) *Knox, In re* (1889), 23 L. R. (Ir.) 542.

(*y*) See also "Hammick's Marriage Laws of England," pp. 258—261.

(*z*) But all exceptions in favour of Jews and Quakers relate only to formalities, not essentials. Therefore a marriage between

two Jews, an uncle and a niece, was held invalid, though valid both by Jewish law and by the law of the place where it was contracted: *De Wilton, In re, De Wilton v. Montefiore*, (1900) 2 Ch. 481; 69 L. J., Ch. 717; 83 L. T. 70.

coupling, however, the removal of the disability with the condition that all such marriages should require the *presence* of a registrar to render them valid.

Nullity.

But now, by section 4 of the Marriages Act, 1898, " . . . marriages may be lawfully solemnised in the registered building, named in the notice of the marriages and in the superintendent-registrar's certificate or certificate and licence, issued pursuant to the provisions of the said Act" (the Marriage Act, 1836), "or any Act amending the same, between and by the parties described in the notice and certificate or certificate and licence, according to such form and ceremony as they may see fit to adopt, without the presence of any registrar"

Marriages
Act, 1898
(61 & 62 Vict.
c. 58), s. 4.

By section 6, sub-section 1, parties to a marriage under this Act "shall in some part of the ceremony make the following declarations:—

S. 6, sub-ss. 1,
2, 3.

" 'I do solemnly declare that I know not of any lawful impediment why I, A. B., may not be joined in matrimony to C. D.'

"And each of the parties shall say to the other the words following:—

" 'I call upon these persons here present to witness that I, A. B., do take thee, C. D., to be my lawful wedded wife (or husband),' or in lieu thereof the words following:—

" 'I, A. B., do take thee, C. D., to be my wedded wife (or husband).'

"(2) The aforesaid declarations shall be made in the presence of the authorized person hereinafter mentioned and two or more witnesses.

"(3) No marriage under this Act shall be solemnized in any registered building except in the presence of a person (in this Act referred to as an authorized person) certified as having been duly authorized for the purpose by the trustees or other governing body of the building,

Nullity.
 Marriages
 Act, 1898.
 S. 1, sub-s. 3.

or of some registered building in the same registration district."

And by section 1, sub-section 3, in the case of "Roman Catholic registered buildings, the words 'trustees or governing body' shall include the bishop or vicar-general of the diocese."

Church of
 England
 marriages.
 4 Geo. 4,
 c. 76, s. 22.
 Must be by
 clergyman of
 Established
 Church.
 Mock clergy-
 man, view of
 Ecclesiastical
 Courts.

Marriages by the ordinary's licence, or after publication of banns, in other words Church of England marriages, are still regulated by 4 Geo. 4, c. 76, s. 22, which enacts that, " . . . if any persons shall . . . knowingly and wilfully consent to or acquiesce in the solemnization of such marriage by any person not being in holy orders, the marriages of such persons shall be null and void to all intents and purposes whatsoever." But both parties to the marriage must be cognizant of the disregard of the law, in order to vitiate a marriage under the above section (a); and the Ecclesiastical Courts held that it was questionable whether a marriage, effected by imposing upon an innocent party a *pretended clergyman* and a supposititious licence, might not bind the guilty artificer of such a fraud (b).

Marriage
 before a
 consul.

As to marriage in any foreign country before a consul or person acting for him, see 12 & 13 Vict. c. 68, and 31 & 32 Vict. c. 61 (c).

(a) See *Tongue v. Tongue* (1836), 1 Moore, P. C. C. 90; *Dormer (falsely called Williams) v. Williams* (1838), 1 Curt. 870; *Clowes v. Jones (falsely calling herself Clowes)* (1842), 3 Curt. 193.

(b) *Hawke v. Corri (calling herself Lady Hawke)* (1820), 2 Hagg. Con. C. 288. Where a person is prosecuted for falsely pretending to be in holy orders, and solemnizing a marriage according to the rites of the Church

of England, a licence by the bishop to a curacy, or institution to a benefice, is no defence to the indictment, if the accused knew he had no valid letters of ordination. *Reg. v. Ellis* (1888), 16 Cox, C. C. 469.

(c) See "Hammick's Marriage Laws of England," pp. 258—263. A marriage duly solemnized under these statutes, in France, between a Frenchman and an Englishwoman is valid as regards form in England, though

I extract the following from "Hammick's Marriage Laws of England," p. 263:—

"In distant lands, where the ordinary facilities for obtaining the solemnization of marriage are wanting, and the *lex loci* is not available, marriages may be lawfully contracted *per verba de præsenti* according to the law of England as it was before the 26 Geo. 2, c. 33 (Lord Hardwicke's Marriages Act). But it has been decided by the House of Lords, in *Reg. v. Millis (d)*, that unless the contract *per verba de præsenti* has been entered into in the presence of a minister in episcopal orders, it does not constitute a valid marriage. A marriage between English subjects, celebrated according to the rights of the Church of England, but not in the presence of an ordained clergyman, is invalid at common law (e).

"It is doubtful, however, whether the decision in *Reg. v. Millis* would apply to a marriage *bonâ fide* contracted in foreign parts, or in the colonies, or on board ship, where it was impossible to procure the attendance of an ordained minister of religion (f); but where no such difficulty exists, the presence of a clergyman must be deemed indispensable, and it appears to be doubtful

held invalid as regards form by the French Court: *Hay v. Northcote*, (1900) 2 Ch. 262; 69 L. J., Ch. 586; 82 L. T. 656.

(d) (1844), 10 Cl. & Fin. 534.

(e) "In the case of *Catherwood v. Caston* (1844), 13 M. & W. 261; 13 L. J., Ex. 433, the plaintiff, a daughter of the English Consul at Beyrout, in Syria, was married at the Consulate, her father and others being present at the marriage, which was celebrated by an American missionary according to the rites

of the Church of England. The judges held they were bound by the authority of *Reg. v. Millis* (1844), 10 Cl. & Fin. 534, and that on the facts there had been no valid marriage. This was in 1844. The 12 & 13 Vict. c. 68, however, passed in 1849, distinctly gives validity to past marriages of that nature (sect. 20)."

(f) This doubt was strongly expressed by Sir F. H. Jeune (President), in 1903, in the case of *Lightbody v. West* (1902), 87 L. T. 138.

Nullity.

whether the services of a Roman Catholic priest would be sufficient" (*g*).

Marriage on
board H. M.
ship.

In *Culling v. Culling and Nicholson* (*h*), the marriage of an officer in her Majesty's army to a British subject, solemnized by an ordained minister of the Church of England, on board one of her Majesty's ships, then lying at Limasol in Cyprus, was held valid, although there had been no publication of banns or licence, neither had there been any previous public notification of the intended marriage.

Marriages
within lines
of British
Army.

The following observations on the subject of (1) "marriages within the lines of the British army," and (2) "marriages at sea," are extracted from "Hammick's Marriage Laws of England":—

On the first point Mr. Hammick says (*i*): "Upon the same principle by which marriages in the houses or chapels of ambassadors and in British factories abroad have been recognized as valid, before they had the authority of statute law, the marriage of a British subject within the lines of a British army serving abroad has been upheld in the English Courts (*k*). And now, by 4 Geo. 4, c. 91, 'marriages solemnized within the British lines by any chaplain or officer, or any person officiating under the

(*g*) "In Armenia, by the Persian law, Christian marriages are recognized, if valid according to the religious denomination of the parties. The Armenian priests having refused to marry certain parties because the woman was pregnant, a Roman Catholic priest performed the ceremony according to the rites of his Church, he having obtained a special licence to do so on the ground that the man was a Roman Catholic and the woman a Protestant. Held, that, as by the law of the country where the

celebration took place the marriage was invalid, and as the forms prescribed by 12 & 13 Vict. c. 68 (Consular Marriages), had not been complied with, there was no marriage. *Alison, In re* (1874), 31 L. T. 638."—Hammick, p. 263, n. (*f*).

(*h*) (1896) P. 116; 65 L. J. P. 59.

(*i*) p. 261.

(*k*) *Burn v. Farrar* (*falsely called Farrar*) (1819), 2 Hagg. C. R. 369; *Ruding v. Smith* (*falsely calling herself Ruding*) (1821), 2 Hagg. C. R. 371.

orders of the commanding officer of a British army serving abroad,' are confirmed as to the past and legalized as to the future. The marriage of an officer, celebrated by a chaplain of the British army within the lines of the army when serving abroad, is valid under this Act, though such army is not serving in a country in a state of actual hostility" (l).

Nullity.
Marriages within lines of British Army.

On the second point Mr. Hammick says (m): "When solemnized in distant lands by an ordained minister of religion, marriages on board ship would probably be held to be subject to the law which prevailed in England previously to Lord Hardwicke's Act. There is little doubt that in a heathen land marriages between British subjects may lawfully be celebrated by a clergyman of the Church of England either on board ship or on shore.

Marriages on board ship in distant land.
Heathen country.

"*Marriages on board British Vessels of War.*—A class of marriage is occasionally solemnized abroad between European British subjects, which the framers of 4 Geo. 4, c. 91, omitted to notice, although it does not seem to be distinguishable in principle from a marriage solemnized within the lines of a British army serving abroad—namely, a marriage solemnized on board a British vessel of war on any foreign station. In 1849, however, by section 20 of the Consular Marriages Act, all doubts were removed with respect to any previous marriage solemnized on board a British vessel of war by a minister of the Church of England or of the Church of Scotland, and also with respect to any previous marriage solemnized according to any religious ceremony, or contracted *per verba de præsenti* on board a British vessel of war on any foreign station in the presence of the officer commanding such vessel; but no provision was made respecting future marriages. Since the passing of the Act of 1849, such marriages have been from time to time solemnized, the

Marriages on board H. M. ships.

(l) *Waldegrave Peerage* (1837), 4 Cl. & Fin. 649.

(m) p. 266.

Nullity.
 Marriages on
 board H. M.
 ships.

certificates of which are recorded in the registry of the diocese of London ; and it appears that about one-fourth of the number of such marriages, down to the year 1868, had been solemnized or contracted in the presence of the commanding officer of the vessel, and not in the presence of any minister of religion (*n*).

“These marriages on board her Majesty’s ships have, however, been confirmed retrospectively by the Act of 42 & 43 Vict. c. 29, which recites that whereas officers commanding her Majesty’s ships on foreign stations have permitted marriages to be solemnized according to religious rites and ceremonies, or to be contracted *per verba de præsentî* in the presence of such officers in the belief that such marriages were authorized by law, and that doubts have arisen, &c.; and then enacts that all marriages, both of the parties being British subjects, which before the passing of the Act have been so solemnized, shall be valid. This statute confirms such marriages to the date of its passing—viz., July 21st, 1879 ; but it is entirely retrospective, and neither interdicts marriages of the same doubtful nature for the future, nor recognizes their validity, so that all is left in uncertainty. It is understood that instructions have been issued by the Lords of the Admiralty to commanding officers to cease to permit such marriages to be celebrated in their presence ; and it certainly seems expedient that such matrimonial contracts, surrounded as they are with so much doubt, should be disallowed altogether, or else that a statutory confirmation of them in future should be enacted. For this class of marriages on board vessels of war the Queen’s Regulations for the Navy prescribe the steps to be taken for the purpose of preserving evidence of the ceremony in England.

Marriages on
 board mer-
 chant ships.

“*Marriages on Board Merchant Ships*.—There is a further class of marriages on board ships, for proof of which

provision has been made by the Merchant Shipping Act, 1854. It is provided by section 282 of that Act that every master of a merchant ship shall enter in the official log book of the vessel every marriage taking place on board his vessel, with the names and ages of the parties. There is, however, no statutory authority for the solemnization of any such marriage on board a British merchant ship, nor has any statute ever been passed to give retrospective effect to any such marriage; and where the captain performed the ceremony, its validity might certainly be challenged. Indeed, it is difficult to see, after the decision of the House of Lords in *Reg. v. Millis (o)*, whence the legality of such a ceremony of marriage could be derived under English (as distinguished from Scotch) law. But in the case of both parties being British subjects emigrating to a British colony, if their marriage has been solemnized on board a British merchant vessel by a minister in holy orders, its validity would probably be upheld in an English Court. Upon the analogy of legal decisions that British emigrants carry with them the common law of England until they become subject, *ratione loci*, to some other law, and if the parties are both Scottish people, it might be held that inasmuch as they carry with them the law of Scotland, until they become subject to some other law, they are enabled to contract matrimony by words of present consent, without minister, form, or ceremony."

Nullity.

The place where the marriage may be solemnized depends on the licence or certificate. With a special licence the ceremony may be performed at any time in any church, chapel, or *other meet and convenient place*.

Place of celebration.
Marriage by special licence.

If performed by virtue of an ordinary's licence or banns, the place of the ceremony is governed by 4 Geo. 4, c. 76, s. 22, which enacts that, " . . . if any persons shall knowingly and wilfully intermarry in any

By ordinary's licence or banns.

- Nullity. other place than a church, or such public chapel wherein banns may be lawfully published, unless by special licence the marriages of such persons shall be null and void to all intents and purposes whatsoever."
- Marriage in parish church or public chapel. 4 Geo. 4, c. 76, s. 2. But a marriage solemnized in a vestry belonging to and forming part of the church is a good marriage (*p*).
- Marriage in vestry. In Ambassador's chapel. A marriage between an Englishman and a domiciled French lady, at the house of the British Ambassador at Paris, by the chaplain to the embassy, is a valid marriage under the stat. 4 Geo. 4, c. 91 (*q*).
- 4 Geo. 4, c. 91.
- Church under repair. 5 Geo. 4, c. 32. 5 Geo. 4, c. 32, provides for the solemnization of marriages and due proclamation of banns during the repairs of any church or public chapel, &c. (*r*).
- Licence or certificate of registrar. If performed by virtue of a Superintendent-Registrar's licence or certificate, the place of the ceremony is governed by 6 & 7 Will. 4, c. 85, s. 42, which enacts that, ". . . . if any persons shall knowingly and wilfully intermarry under the provisions of this Act in any place other than the church, chapel, registered building, or office or other place specified in the notice and certificate the marriage of such persons, except in any case herein-after excepted, shall be null and void"
- Marriage Act, 1836 (6 & 7 Will. 4, c. 85, s. 42).
- Marriage Act, 1898 (61 & 62 Vict. c. 5). Section 4 of the Marriage Act, 1898, only repeals so much of the above section as requires the presence of the registrar at the solemnization of the marriage; therefore that portion of it cited in the last paragraph is still in force.
- Hours during which persons may marry. The hours during which marriages may now be solemnized are regulated by 49 Vict. c. 14, and are between

(*p*) *Wing v. Taylor (falsely calling herself Wing)* (1861), 2 S. & T. 278; 30 L. J. P. 258. See also *Knox, In re, ante*, p. 112.

(*q*) *Lloyd v. Petitjean (falsely calling herself Lloyd)* (1839), 2 Curt. 251.

(*r*) As to such marriages previous to the passing of this statute, see *Stallwood v. Tredger* (1815), 2 Phill. 287; and for a more recent case, *Reg. v. Cresswell* (1876), 1 Q. B. D. 446; 45 L. J., M. C. 77; 33 L. T. 760.

8 a.m. and 3 p.m. Marriages by special licence, as already stated, may be solemnized at any hour (s). Nullity.

19 & 20 Vict. c. 96, commonly known as the Scotch Marriage Act, by section 1, enacts that “ . . . no irregular marriage contracted in Scotland by declaration, acknowledgment, or ceremony shall be valid unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage; any law, custom, or usage to the contrary notwithstanding.” Scotch Marriage Act (19 & 20 Vict. c. 96, s. 1).

Where two persons domiciled in England arrived in Scotland about 4 a.m. of the 1st of July, 1870, remained there until the 21st following, and between 11 and 12 a.m. of that day contracted a marriage by declaration before a registrar: the Court held, that the Scotch method of reckoning time for legal purposes being from midnight to midnight, they had not lived in Scotland for the full period of time required by the statute (t). Insufficient residence under.

Although by no means necessary, it has been a common practice for the innocent party to obtain a decree of nullity, where the other party to a marriage has committed bigamy. A petitioner has a right *ex debito iustitiæ* to a decree of nullity, where the respondent's husband, or wife, was alive at the time of the second marriage; and the Court has no discretion to withhold relief (u). Decree of nullity after bigamous marriage.

The Ecclesiastical Courts always allowed a party, notwithstanding a conviction for bigamy, to plead and prove Invalidity of first marriage.

(s) See further on this subject, “Hammick's Marriage Laws of England,” Chap. I., pp. 3—12; Chap. IV., pp. 68—107; Chap. V., pp. 107—166; Chap. VIII., pp. 201—221.

(t) *Lawford (otherwise Davies) v. Davies* (1878), 4 P. D. 61; 47 L. J. P. 38; 39 L. T. 111. See further as to Scotch mar-

riages, *Bell v. Graham*, 13 Moore, P. C. C. 242; *Yelverton v. Longworth* (1864), 4 Macq. H. L. 746; 11 L. T. 118; *Hamilton v. Hamilton* (1842), 9 C. & F. 327.

(u) *Bateman v. Bateman (otherwise Harrison)* (1898), 78 L. T. 472.

Nullity.
 Practice of
 Ecclesiastical
 Courts.
 Misconduct
 of party
 to suit for
 nullity on
 ground of
 bigamy.
 Re-marriage
 after divorce.
 Foreign
 divorces.
 Effect of in
 England.

the invalidity of his first marriage in bar of a sentence of nullity (*x*).

Misconduct, however gross, of a party proceeding to annul a marriage by reason of bigamy is no bar (*y*); and where one of the parties to a divorce marries again after decree *nisi*, but before decree absolute, the marriage is void (*z*).

A foreign (*a*) tribunal has no authority, so far as consequences in England are concerned, to pronounce a decree of divorce *à vinculo*, in the case of an English marriage between English subjects, unless such subjects are at the time of such decree pronounced *bonâ fide* domiciled in the country where the tribunal has jurisdiction, and the suit is prosecuted without collusion (*b*).

(*x*) *Bruce v. Burke* (1825), 2 Add. 471.

(*y*) *Miles v. Chilton (falsely calling herself Miles)* (1849), 1 Rob. Ecc. 684.

(*z*) *Noble v. Noble and God-man* (1869), L. R., 1 P. & D. 691; 38 L. J. P. 52; 20 L. T. 1016; *Wickham v. Wickham* (1880), 6 P. D. 11; 49 L. J. P. 70; 43 L. T. 445. See also *Chichester v. Mure (falsely called Chichester)* (1863), 3 S. & T. 223; 32 L. J. P. 146; 8 L. T. 676. See also *Rogers (otherwise Briscoe) (falsely called Halmshaw) v. Halmshaw* (1864), 3 S. & T. 509; 33 L. J. P. 141; 11 L. T. 21.

(*a*) The word foreign in the Divorce Court includes every place out of England, Wales and the town of Berwick-upon-Tweed.

(*b*) See *Shaw and Others (Appellants) v. Gould, Moore and Others (Respondents)* (1868),

L. R., 3 H. L. 55; 37 L. J., Ch. 433; 18 L. T. 833. See also on the same point, *Dolphin v. Robins and Paxton* (1859), 29 L. J. P. 11; 7 H. L. Cas. 390; 3 Macq. H. L. Cas. 563; *Pitt v. Pitt* (1864), 4 Macq. H. L. Cas. 627; 10 L. T. 626; *Wilson, In re* (1865), L. R., 1 Eq. 247; 35 L. J. Ch. 243; 13 L. T. 576; *Maghee v. M'Allister* (1853), 3 Ir. Ch. Rep. 604 (cases where Scotch Courts purported to dissolve an English marriage); *Palmer v. Palmer* (1859), 1 S. & T. 551; 29 L. J. P. 26; 2 L. T. 89; *Cohen v. Cohen* (1876), 34 L. T. 33; *Briggs v. Briggs* (1890), 5 P. D. 163; 49 L. J. P. 38; *Shaw v. Att.-Gen.* (1870), L. R., 2 P. & D. 156; 39 L. J. P. 81; 23 L. T. 322 (cases where American Courts purported to dissolve English marriages); *Birt v. Boutinez (falsely called Birt)* (1868), L. R., 1 P. & D. 487; 37 L. J. P. 50; 18 L. T. 586;

Where a domiciled Scotchman merely came to England for the purpose of getting married, and immediately after the ceremony returned with his wife to Scotland, where he cohabited with her for two years, when she obtained in the Scotch Courts a decree for a divorce *by reason of her husband's adultery only*, a ground of divorce not recognized by the English Court; Sir James Hannen, whose decision was affirmed first by the Court of Appeal, and finally by the House of Lords, held that the Scotch Court had power to dissolve the marriage (c).

Nullity.
—
Scotch domicile.
English marriage.
Scotch divorce for adultery of husband only.

Where a marriage has been dissolved by a competent Court of the husband's domicile, the wife cannot afterwards petition the English Court for a decree of nullity on the same ground (d).

Marriage dissolved by Court of husband's domicile.
Petition to English Court for nullity on same ground.
Divorce in Cape Colony.
Roman Dutch law re-marriage.

By the law of Cape Colony the guilty party to a divorce cannot marry again during the lifetime of the innocent party. But the nature of this restriction is penal, and the colonial divorce having restored the parties to the position of unmarried people, the guilty party may come over here and contract a legal marriage in England during the lifetime of the innocent party (e).

where there were both a Scotch marriage and a Belgian marriage and a Belgian divorce.

(c) *Harvey (otherwise Farnie)* v. *Farnie* (1882), 8 App. Cas. 43; 52 L. J. P. 33; 48 L. T. 273. In Sir James Hannen's judgment in this case (5 P. D. at p. 154), the following cases are cited: *Warrender v. Warrender* (1835), 2 Cl. & F. 488; *Lolley's Case* (1812), Russ. & R. 237; *Tovey v. Lindsay* (1813), 1 Dow, 117, 131; *McCarthy v. De Caix* (1831), 2 Russ. & My. 617; *Geils v. Geils* (1848), 1 Macq. H. L. 259; 20 L. T. 145; *Conway v. Beasley* (1831), 3 Hag. Eccl.

639; *Maghee v. M'Allister* (1853), 3 Ir. Ch. Reps. 604; *Munro v. Munro and Munro* (1840), 7 Cl. & F. 842. See also *Bater v. Bater (otherwise Lowe)*, (1906) P. 209; 75 L. J. P. 60; 94 L. T. 835; *Armitage v. Atten-Gen.* (*Gillig* cited), (1906) P. 135; 75 L. J. P. 42; 94 L. T. 614; *Cass v. Cass (otherwise Pfaff)* (1910), 102 L. T. 397.

(d) *Turner (falsely called Thompson) v. Thompson*, or *T. v. T.* (1888), 13 P. D. 37; 57 L. J. P. 40; 58 L. T. 387.

(e) *Scott v. The Attorney-General* (1886), 11 P. D. 128; 55 L. J. P. 57; 56 L. T. 924.

Nullity.

Re-marriage
before time
required by
Indian
Divorce Act.

But where one of the parties to a divorce under the Indian Divorce Act, 1859, which by section 59 prohibits re-marriage for six months after decree absolute, remarried in England before that time had elapsed; the Court held that the restriction in this case being not penal, but merely a matter of procedure, the second marriage was invalid (*f*).

Scotch
divorce.
Domicil of
husband not
bonâ fide.

Where a husband's petition had been dismissed by the English Court, and he subsequently acquired, apparently, a domicil in Scotland, and the Scotch Court pronounced a divorce in his favour, and the wife and the co-respondent, who had been parties to the arrangement, subsequently married; the English Court held that such marriage was null and void (*g*).

American
divorce.
Husband's
domicil
English.

Where a domiciled Englishman, who had married in England a native of the United States, was cited to appear in proceedings for divorce commenced in America by his wife, but refused to appear; the Court held, that the decree in America dissolving the English marriage was not binding in this country (*h*).

Consan-
guinity and
affinity before
5 & 6 Will. 4,
c. 54, s. 2.

Previous to the 5 & 6 Will. 4, c. 54 (passed the 31st of August, 1835), marriages within the prohibited degrees of consanguinity and affinity were only *voidable* by a decree of the Ecclesiastical Court, and remained valid unless disputed during the lifetime of the parties. Section 2, however, renders all such marriages, if contracted *in England*, "absolutely null and void to all intents and purposes whatever."

Prohibited
degrees.

The prohibited degrees are those contained in the Prayer Book (*i*), and a person is restrained from marriage

(*f*) *Warter v. Warter* (1890), 15 P. D. 152; 59 L. J. P. 87; 63 L. T. 25.

(*g*) *Bonaparte v. Bonaparte* (*otherwise Megone*), (1892) P. 402; 62 L. J. P. 1; 67 L. T. 531.

(*h*) *Green v. Green and Sedg-*

wick, (1893) P. 89; 62 L. J. P. 112; 68 L. T. 261.

(*i*) *Sherwood v. Ray* (1837), 1 Moore, P. C. C. 355 (notis). A good explanatory list of these will be found in Hammick's "Marriage Laws of England," 2nd ed., pp. 35—37; and see *post*, p. 277.

as well with illegitimate as with legitimate relations (*k*). Such marriages are void wherever contracted, if the parties are domiciled in England (*l*), even when both parties are fully cognizant of the impediment (*m*).

Nullity.
—

Marriage with a deceased wife's sister has now been made valid by "The Deceased Wife's Sister's Marriage Act, 1907" (7 Edw. 7, c. 47) (*n*), and the marriage is valid whether contracted before or after the Act, and whether within or without the United Kingdom.

Deceased
Wife's
Sister's Mar-
riage Act.

But a marriage with a deceased husband's brother, valid by the law of the country where it was celebrated, and where the parties were domiciled, is valid in England; although the wife was domiciled in England at the time of the first marriage, and merely acquired a foreign domicile by reason of that marriage (*o*).

Deceased
husband's
brother.

Another ground for a petition for nullity of marriage is the want of consent in the parties, or one of them—*consensus non cubitus facit matrimonium*. Thus a marriage had when either party is under duress, or contracted under the influence of force or fear, is invalid (*p*).

Want of
consent.

Marriage by
duress.

Before the passing of the Divorce Act, marriages obtained by abduction (*q*) or accomplished by fraud and

Abductions.

(*k*) See *Reg. v. St. Giles-in-the-Fields*; *S. P.*, *Reg. v. Chadwick* (1847), 17 L. J., Q. B. 81; 11 Q. B. 173; *Reg. v. Brighton (Inhabitants)* (1861), 1 B. & S. 447; 30 L. J., M. C. 197; 5 L. T. 56. See also *Horner v. Horner* (1799), 1 Hagg. Con. C. 352; *Woods v. Woods* (1840), 2 Curt. 521.

Mette v. Mette (1859), 1 S. & T. 416; 28 L. J. P. 117.

(*m*) *Andrews (otherwise Ross) v. Ross* (1888), 14 P. D. 15; 58 L. J. P. 14; 59 L. T. 900.

(*n*) For text of this Act, see Appendix.

(*o*) *Bozzelli, In re, Husey-Hunt v. Bozzelli*, (1902) 1 Ch. 751; 71 L. J., Ch. 505; 86 L. T. 445.

(*p*) *Harford v. Morris* (1776), 2 Hagg. Con. C. 423.

(*q*) *Miss Turner's Case*, H. L. Journ. 1827, 308. See also *Mrs. Wharton's Case*, 1690, Ib. 475 (notis).

(*l*) *Brook and Others (Appellants) v. Brook and Others and Att.-Gen. (Respondents)* (1861), 9 H. L. Cas. 193; 4 L. T. 93; 3 Sm. & G. 481; 27 L. J., Ch. 401; *In the goods of Mette*,

Nullity.
 Marriage
 obtained by
 fraud or
 duress.

contrivance (*r*) were dissolved or annulled by Parliament; and in Lord Portsmouth's case, a marriage solemnized under circumstances inferring fraud between a person of weak mind and the daughter of his trustee and solicitor, who had great influence over him, and by whom he was clearly considered of unsound mind, was pronounced null and void by the Ecclesiastical Courts (*s*).

Incapacity of
 mind.

Another ground for nullity is incapacity of mind, or as it is commonly called, insanity; and in giving judgment in *Hancock (falsely called Peaty) v. Peaty (t)*, Lord Penzance on this point says: "The law upon this subject is clear and without difficulty. It is definitely stated by Lord Stowell in *Turner v. Meyers (u)*. 'It rests upon the simple proposition,' says Lord Stowell, 'that marriage is a contract as well as a religious vow, and, like other contracts, will be invalidated by the want of consent of capable persons.' And it may surely be added that, if any contract more than another is capable of being invalidated on the ground of the insanity of either of the contracting parties, it should be the contract of marriage, an act by which the parties bind their property and their persons for the rest of their lives."

(*r*) *Wakefield's Case* (1827), Annual Register, vol. 69, p. 316, cited in Hammick's "Marriage Laws of England," 2nd ed. at p. 49.

(*s*) *Portsmouth v. Portsmouth* (1828), 1 Hagg. E. R. 355. See also *Hull v. Hull*, 17 L. T. 235. And for cases in which marriages have been set aside on this ground in more recent times, see *Scott (falsely called Sebright) v. Sebright* (1886), 12 P. D. 21; 56 L. J. P. 11; 57 L. T. 421; *Cooper (otherwise Crane) v. Crane*, (1891) P. 369; 61 L. J. P. 35; *Clarke (otherwise Stier) v. Stier*, (1896) P. 1; 65 L. J.

P. 13; 72 L. T. 632; *Bartlett (falsely called Rice) v. Rice* (1894), 72 L. T. 122.

(*t*) (1867), L. R., 1 P. & D. 335, at p. 341; 36 L. J. P. 57; 16 L. T. 182.

(*u*) (1808), 1 Hagg. Cons. C. 414. In this case a person, after recovery, instituted proceedings in the Ecclesiastical Courts to annul a marriage had when he was *non compos*. For other cases in which the Ecclesiastical Courts have annulled marriages, see *Browning v. Reane* (1812), 2 Phill. 69; *Wilkinson v. Wilkinson* (1845), 4 No. of Cas. 295.

But before pronouncing a decree of nullity on this ground, the Court must be satisfied that there was disease of the mind existing at the time of the marriage, though it will not inquire into the extent of the derangement. And when in a case of this kind a *guardian ad litem* has been assigned to the lunatic, if in the course of the suit it is alleged that the lunatic has since recovered her faculties and is then in a sound state of mind, the Court will not make a decree at the instance of the guardian till that question is settled (x).

Nullity.

Insanity must exist at time of marriage.
Insanity.
Recovery during trial.

The head-note to the case of *Durham v. Durham* (y), heard before Sir James Hannen in March, 1885, is in the following words: "The burden of shewing that the respondent was insane at the time of the marriage lies upon the party asserting it, and the Court has to determine whether the respondent was capable of understanding the nature of the contract, and the duties and responsibilities which it creates, and was free from the influence of morbid delusions upon the subject."

Burden of proof on person alleging insanity.

The marriages of persons found to be insane by any commission under the Great Seal of Great Britain or Ireland, or whose persons or estates are by virtue of any Act of Parliament committed to particular trustees, are declared null and void, unless *before the marriage* they are declared of sane mind by the Lord Chancellor of Great Britain or Ireland, or by such trustees or the major part of them, as the case may be (z).

Marriages of persons found to be insane.
15 Geo. 2, c. 30; 51 Geo. 3, c. 37.

I extract the following from Mr. Hammick's treatise on the Marriage Laws of England, 2nd ed., p. 45: "The marriage of a lunatic not under a commission of lunacy during a lucid interval is valid. In cases of the most inveterate malady it has been held that there are lucid

Marriage of a lunatic during a lucid interval.

(x) *Hancock (falsely called lane) v. Jackson*, (1908) P. 308; *Peaty v. Peaty* (1867), L. R., 1 77 L. J. P. 147.
(y) (1885), 10 P. D. 80.
(z) 15 Geo. 2, c. 30; 51 Geo. 3, c. 37.

Nullity.
 Marriage of
 lunatic—lucid
 interval.

intervals when the mind is apparently rational upon all subjects, and no symptom of delusion can be called forth on any subject; so that, the disorder being for the time absent, legal acts may be performed. It is, however, difficult to prove a lucid interval, because the total absence of all delusions cannot easily be ascertained. In a case where the testamentary capacity of a person was in question, the sanity of the moment was, in a great measure, inferred from the internal character of the wisdom of the act itself, and the will was established (a). But with respect to marriage, the entire absence of wisdom in the act will certainly not be conclusive against the sanity of the party. The man, in the best exercise of his reason, might not be a wise man; and the question in such a case is as to the sanity of the party, not the wisdom of the act. Lord Stowell was of opinion that no evidence would be sufficient to induce the Court to pronounce against the sanity of an act to which the man himself, not disqualified by proof of insanity, adheres, and from which he does not himself pray to be relieved (b).

Burden of
 proof as to
 lucid interval.
 Opinion of
 Lord
 Thurlow.

“The question of insanity has been discussed in several elaborate judgments by eminent judges. With respect to lucid intervals, Lord Thurlow ruled that ‘the burden of proof attaches on the party alleging such lucid interval, who must show sanity and competence at the period when the act was done, and to which the lucid interval refers; and it is of equal importance that the evidence in support of the allegation of a lucid interval should be as strong as where the object of the proof is to establish derangement’ ” (c).

Incapacity of
 body at

If, *at the time of its solemnization*, either of the parties

(a) *Cartwright v. Cartwright*
 (1793), 1 Phill. 90.

calling herself Turner (1808), 1
 Hagg. Cons. C. 414.

(b) *Turner v. Meyers* (*falsely*

(c) *Att.-Gen. v. Parnther*
 (1792), 3 Br. C. C. 441.

to a marriage is impotent, the marriage is voidable *ab initio*, and the Court may pronounce a decree declaring it null and void (*d*). Nullity. — time of celebration.

But a suit for nullity on this ground can only be brought by the party who suffers the injury (*e*), but in an Irish case (*f*) it was held, that if a woman altogether repudiates the relation of wife and the obligations of the marriage contract, the impotent man may show that there is no *verum matrimonium* and maintain such a suit; and third persons—whatever their interest—cannot sue for a decree of nullity on the ground of impotence, neither can a marriage be impeached on this ground after the death of one of the parties (*g*). Suit must be instituted by person suffering the injury.

In order to establish marriage there must be the power present or to come of sexual intercourse (*h*). A male is capable of marriage at fourteen, a female at twelve years of age (*i*). Age of puberty.

The impediment to consummation should, strictly speaking, be shown to be incurable (*k*), for, save in exceptional cases, as where a wife might have been cured by an operation, and refused to submit to it (*l*), the Court will not make a decree of nullity where a cure is possible (*m*). Impediment should be incurable.

(*d*) *B—n v. M—e* (1852), 2 Robert. 584. See also *P. v. S.* (1868), 37 L. J. P. 80; 19 L. T. 22.

(*e*) *Norton v. Seton (falsely calling herself Norton)* (1819), 3 Phill. 147; *X. v. Y.* (1865), 34 L. J. P. 81; *Lewis v. Hayward* (1866), 35 L. J. P. 105.

(*f*) *A. v. A.* (1887), 19 L. R. Ir. 403, Mat.

(*g*) *A. v. B. and Another* (1868), L. R., 1 P. & D. 559; *P. v. S.*, 37 L. J. P. 80; 19 L. T. 22.

(*h*) *D. v. A.* (1845), 1 Robert. 279.

(*i*) *Arnold v. Earle* (1758), 2 Lee, 31.

(*k*) *Brown v. Brown* (1828), 1 Hagg. 528.

(*l*) *Welde (alias Aston) v. Welde* (1731), 2 Lee, 586; *Stagg v. Edgecombe* (1863), 3 S. & T. 240; 32 L. J. P. 153; 8 L. T. 643.

(*m*) *L. v. L. (falsely called W.)* (1882), 7 P. D. 16; 51 L. J. P. 23; 47 L. T. 132.

Nullity.

Triennial
cohabitation,
old rule as to.

The old rule of the Ecclesiastical Courts, founded on the canon law, was to require a triennial cohabitation between the parties, though it was not necessary that such cohabitation should be continuous (*n*).

But this rule only applied when the impotency was left to be presumed from continual non-consummation, and not when it was plainly proved *aliunde* (*o*), and it has long ceased to be of any practical value (*p*).

Wilful
refusal of
marital inter-
course.

Wilful wrongful refusal of marital intercourse is not in itself sufficient ground for a decree of nullity; but where after a reasonable time it is shown that there has been no sexual intercourse, and that the wife has resisted all attempts, the Court, if satisfied of the *bona fides* of the suit, will infer that the refusal arises from incapacity, and pronounce a decree (*q*).

*Impotentia
quoad hunc,
vel hanc.*

A person may be generally capable of performing the act of coition and yet incapable of performing it with a particular individual owing to certain causes, *e.g.*, hysteria (*r*).

(*n*) *Aleson v. Aleson* (1728), 2 Lee, 576; *Welde* (alias *Aston*) v. *Welde* (1731), 2 Lee, 580; *Briggs v. Morgan* (1820), 3 Phill. 329; *Sparrow* (falsely called *Harrison*) v. *Harrison* (1841), 3 Curt. 27; *Scott v. Jones* (1842), 2 No. of Cas. 36; *Greenstreet v. Cumyns* (1842), 2 Phill. 10; *U—n* (falsely called *F—s*) v. *F—s* (1853), 2 Robert. 614; *N—r* (falsely called *M—e*) v. *M—e*, *Ib.* 625; *A. v. B.* (1853), 1 Ecc. & Ad. 12; *G—s* (falsely called *T—e*) v. *T—e*, *Ib.* 389; *Marshall v. Hamilton* (1864), 33 L. J. P. 159; 10 L. T. 787. See also (1864), 34 L. J. P. 12; 11 L. T. 317; and *nom. M.* (falsely called *H.*) v. *H.* (1864),

3 S. & T. 592.

(*o*) *F.* (falsely called *D.*) v. *D.* (1865), 4 S. & T. 86; 34 L. J. P. 66; 12 L. T. 84.

(*p*) See further as to this rule, *G. v. G.* (1871), L. R., 2 P. & D. 287; 40 L. J. P. 83; 25 L. T. 510; *G. v. M.* (1885), 10 App. Cas. 171; 55 L. T. 398.

(*q*) *S. v. A.* (otherwise *S.*) (1878), 3 P. D. 72; 47 L. J. P. 75; 39 L. T. 127. See also *F. v. P.* (falsely called *F.*) (1896), 75 L. T. 154; *B.* (otherwise *H.*) v. *B.*, (1901) P. 39; 70 L. J. P. 4; *W. v. W.* (1905), 74 L. J. P. 112; 93 L. T. 456.

(*r*) *H. v. P.* (falsely called *H.*) (1873), L. R., 3 P. & D. 126.

In the Ecclesiastical Court a sentence of nullity was pronounced by reason of a natural incurable malformation of the female, admitting of a partial connection only (*s*). Nullity. Partial connection.

An agreement to put an end to a suit for nullity, on the ground of impotence, is not void as against public policy (*t*). Compromise of suit.

Cruelty is no answer to a petition for nullity (*u*), neither is adultery (*x*). Cruelty and adultery no answer.

But where a marriage is questioned on the ground of the husband's impotence, he may answer that the non-consummation arose through the wife's frigidity and dislike to connection (*y*). Frigidity.

Mere delay in commencing proceedings for nullity of marriage on the ground of impotence is no bar to the success of such a suit; but where there has been delay it must be explained, and the Court must be satisfied of the sincerity and *bona fides* of the petitioner before it will grant relief (*z*). Delay. Insincerity. Must be explained.

(*s*) *D. v. A. (falsely calling herself D.)* (1845), 1 Robert. 279.

(*t*) *Wilson v. Wilson* (1845), 14 Sim. 405; affirmed, 1 H. L. Cas. 538.

(*u*) *Humphrey v. Williams* (1860), 29 L. J. P. 62.

(*x*) *Anon.* (1857), Dea. & Sw. Eccl. Cas. 295. See also *M. (otherwise D.) v. D.* (1885), 10 P. D. 75; 54 L. J. P. 68; and *S. (otherwise G.) v. S.*, (1907) P. 224; 76 L. J. P. 118.

(*y*) *M. v. H.* (1864), 33 L. J. P. 159; 10 L. T. 787; 3 S. & T. 517; but this is, after all, a simple traverse.

(*z*) See the following cases on the subject of delay in bringing

suits for nullity of marriage: *Castleden v. Castleden* (1861), 31 L. J. P. 103; 9 H. L. C. 186; 4 Macq. H. L. 159; 5 L. T. 164; *Evens v. Tytherleigh* (1863), 3 S. & T. 312; 33 L. J. P. 37; 9 L. T. 424; *Marriott v. Burgess* (1864), 3 S. & T. 550; 33 L. J. P. 203; 10 L. T. 847; *M. (falsely called C.) v. C.* (1872), L. R., 2 P. & D. 414; 41 L. J. P. 37; 26 L. T. 321; *Wilkins v. Reynolds* (1876), 1 Pr D. 405; 45 L. J. P. D. 89; where most of the previous authorities are cited and reviewed. See also *M. (otherwise D.) v. D.* (1885), 10 P. D. 75; 54 L. J. P. 68; and *S. (otherwise G.) v. S.*, (1907) P. 224; 76 L. J. P. 118.

Nullity.

Delay may be material element in investigation of case.

Age alone no answer.

Agreement not to sue.

Ante-nuptial pregnancy by party other than the husband.

But, delay may be a material element in the investigation of a case which, upon the facts, is doubtful (a).

Age alone is no answer to a suit for nullity on the ground of impotence (b).

Where a husband and wife after a year's cohabitation separated by deed containing a clause binding them not to make any claim against each other either in law or equity, Lord Hannen held such agreement to be a bar to a suit by the husband for nullity on the ground of his wife's impotence (c).

The facts that a woman has been unchaste before marriage with a person or persons other than her husband, that she is in consequence pregnant at the time of her marriage, and that she has deliberately deceived her husband as to her previous conduct and present condition, do not constitute grounds on which the Court can pronounce a decree of nullity of marriage (d).

The subject of this chapter is further dealt with in Part II. of this work, tit. "Practice in Suits for Nullity of Marriage" (p. 425); see also "Costs," Chap. XVI. (p. 228).

(a) *G. v. M.* (1885), 10 App. Cas. 171; 53 L. T. 398.

(b) *L. (otherwise B.) v. B.*, (1895) P. 274; 64 L. J. P. 121.

See also *Williams v. Homfray* (1861), 2 S. & T. 240; 30 L. J. P. 73; 4 L. T. 89.

(c) *Aldridge v. Aldridge (otherwise Morton)* (1888), 13 P. D. 210; 58 L. J. P. 8; 59 L. T. 896.

(d) *Moss v. Moss (otherwise Archer)*, (1897) P. 263; 66 L. J. P. 154; 77 L. T. 220.

CHAPTER VII.

DAMAGES.

By section 33 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), "Any husband may, either in a petition for dissolution of marriage or for judicial separation, or in a petition limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner; and such petition shall be served on the alleged adulterer and the wife, unless the Court shall dispense with such service, or direct some other service to be substituted; and the claim made by every such petition shall be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations, as actions for criminal conversation are now tried and decided in courts of common law; and all the enactments herein contained with reference to the hearing and decision of petitions to the Court shall, so far as may be necessary, be deemed applicable to the hearing and decision of petitions presented under this enactment; and the damages to be recovered on any such petition shall in all cases be ascertained by the verdict of a jury, although the respondents or either of them may not appear; and after the verdict has been given the Court shall have power to direct in what manner such damages shall be paid or applied, and to direct that the whole or any part thereof shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife" (a).

Damages
against
adulterer.

Mat. C. Act,
1857, s. 33.

Question of
damages, how
tried.

(a) Petitions limited to damages only have been extremely rare since the institution of the Divorce Court.

Damages
against
adulterer.

Principles on
which
damages
assessed.

Co-re-
spondent's
means ought
not to be
considered.

In assessing damages the first question for the jury is, what damage the petitioner has sustained, and the damage he has sustained is the same whether the co-respondent is a rich man or a poor man; therefore the means of the co-respondent have nothing to do with it (except in the case where the co-respondent has used his wealth to seduce the wife), and should not be taken into consideration (*b*). But the jury ought to take into consideration the conduct of the husband and inquire how far he may, by his conduct or carelessness, have contributed to the wife's wrongdoing (*c*).

In the case of *Keyse v. Keyse and Maxwell* (*c*), Sir James Hannen said to the jury: "First you must remember you are not here to punish at all . . . all the law permits a jury to give is compensation for the loss the husband has sustained." No doubt juries have no right in a divorce case to take into consideration the conduct of the co-respondent. But as a matter of fact they nearly always do, however strongly the judge may direct them to the contrary.

Grounds for
giving
damages.

Although one main ground for damages is the breaking up of the matrimonial home, it is not the only ground. If a husband and wife had been living apart, before the wife's adultery, that would be a good reason for assessing damages at a lower rate. But a husband is wronged by the seduction of his wife, far beyond the loss he sustains by the breaking up of his home, and the mere fact that he was living apart from his wife at the time of her seduction,

(*b*) See *Bikker v. Bikker and Whitewood* (1892), 67 L. T. 721.

(*c*) *Keyse v. Keyse and Maxwell* (1886), 11 P. D. 100; 55 L. J. P. 54. See further as to measure of damages, *Anon.* 31 L. J. P. 96, n.; *Stone v. Stone and Appleton* (1864), 3

S. & T. 608; *Comyn v. Comyn and Humphreys* (1860), 32 L. J. P. 210; *Cowing v. Cowing and Wollen* (1863), 33 L. J. P. 149; and *Darbishire v. Darbishire and Baird* (1890), 62 L. T. 664; *Gibson v. Gibson and West* (1906), 94 L. T. 619.

is no answer to his claim for damages (*d*); and damages may be recovered against a co-respondent, even when he did not know the respondent was a married woman (*e*).

Damages
against
adulterer.

Where damages are asked the petition must specify the amount claimed (*f*). The Court cannot recognize any arrangement come to between the parties as to the amount of damages to be paid (*g*), but in practice an arrangement is frequently come to between the petitioner's and the co-respondent's advisers, and the amount so agreed upon is communicated to the jury, who nearly always find for that amount. But where an order is made that the damages be paid to the petitioner in the suit, there is nothing to prevent him from accepting a less sum than that assessed (*h*).

Amount
claimed must
be put in
petition.

Less amount
accepted than
assessed.

In making orders as to the disposition of damages the Court will be guided by the circumstances of each individual case. Sometimes the Court orders them to be paid over to the petitioner, sometimes that a part be paid to the petitioner and the remainder settled for the benefit of the children of the marriage (if any), sometimes the whole is ordered to be settled for the benefit of the children, and sometimes the whole or a part is ordered to be settled for the benefit of the adulterous wife. But in every case it is usual to order that the petitioner's costs—over and above his taxed costs—shall be first paid out of such damages (*i*).

Disposition of
damages.

(*d*) *Evans v. Evans and Platts*, (1899) P. 195; 68 L. J. P. 70; 81 L. T. 60.

(*e*) *Lord v. Lord and Lambert*, (1900) P. 297; 69 L. J. P. 54.

(*f*) *Spedding v. Spedding and Smith* (1862), 31 L. J. P. 96; *Pegler v. Pegler and Russell* (1902), 85 L. T. 649.

(*g*) *Callwell v. Callwell and Kennedy* (1860), 3 S. & T. 259.

(*h*) *Dale v. Dale and Macdonell* (1867), 15 L. T. 595.

(*i*) See *Clark v. Clark and Bouck* (1861), 2 S. & T. 520; 31 L. J. P. 61; 6 L. T. 639; *Taylor v. Taylor and Wolters* (1870), 39 L. J. P. 23; 22 L. T. 140; *Billingay v. Billingay and Thomas* (1866), 35 L. J. P. 84. See also *Callwell v. Callwell and Kennedy* (1860), L. R., 1 P. & D. 168; 3 S. & T. 262; *Forster v. Forster and Berridge* (1865), 4 S. & T. 131; 34 L. J. P. 88; 12 L. T. 504.

Damages
against
adulterer.

Disposition of
damages.

Examples of
how damages
disposed of
and appor-
tioned by
Court.

In *Latham v. Latham* (*k*) the Court ordered the whole of the damages (150*l.*) to be invested in the purchase of a Government annuity for the wife's benefit. In *Narracott v. Narracott and Hesketh* (*l*), where the damages were 2,500*l.*, the Court ordered that, after payment of the petitioner's extra costs, the residue should be settled on the respondent for life *dum casta vixerit*—refusing to add the word *innupta*—and after her death, or on breach of that condition, upon the issue of the marriage.

In *Meyern v. Meyern and Myers* (*m*), where the damages were 5,000*l.*, the Court ordered them to be applied as follows: 1,500*l.* was settled on the youngest child of the marriage, aged five years, the only one remaining in petitioner's custody; 1,500*l.* was given to the petitioner, and also his costs of the suit in addition to those which had been taxed against the co-respondent; the balance was invested in the purchase of a life annuity for the respondent, to be paid to her as long as she lived chastely and did not become the wife of the co-respondent; and, in the event of her breaking either of those conditions, to be paid to the petitioner.

Speedy
payment.

Bankruptcy
of respon-
dent.

Where there is danger of the petitioner losing the damages by delay, the Court will make an order for speedy payment (*n*). Damages obtained in the Divorce Court, which are subject to any order of the Court appropriating them to a particular purpose, are provable under the bankruptcy of the co-respondent (*o*).

(*k*) (1861), 30 L. J. P. 43.

(*l*) (1864), 33 L. J. P. 132;

2 S. & T. 408; 10 L. T. 389.

(*m*) (1876), 2 P. D. 254; 46 L. J. P. 5; 35 L. T. 909.

(*n*) *Bent v. Bent and Footman* (1861), 2 S. & T. 392; 30 L. J. P. 189; 5 L. T. 120; *Pritchard v. Pritchard and Bean* (1870), L. R., 2 P. & D. 53; 39 L. J. P. 46; 22 L. T. 629; *Evans v. Evans*

and *Bird* (1865), L. R., 1 P. & D. 36.

(*o*) *O'Gorman, In re; Bale, Ex parte*, (1899) 2 Q. B. 62; 68 L. J., Q. B. 650; 80 L. T. 501. Previous to the passing of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), the Court, not infrequently when the co-respondent became bankrupt, ordered the damages to be paid to the peti-

A petitioner who is an undischarged bankrupt may now claim damages, without being compelled to give security for the co-respondent's costs (*p*).

Where the co-respondent dies before paying the damages, no order for payment can be enforced against his executor.

Where the petitioner admitted to an act of adultery which had been condoned by the wife, the Court held that his conduct disentitled him to a decree and therefore to damages (*q*).

Where a decree *nisi* is rescinded, it is rescinded for all purposes, and any damages for which a verdict has been given will fall with it (*r*); but in the case of *Hyman v. Hyman and Goldman* (King's Proctor showing cause) (*r*), *Prydes v. Prydes and Wood* (*s*), and also in the case of *Quartermaine v. Quartermaine and Glenister* (*t*), where the petitioner and respondent had become reconciled, on the petitioner applying to the Court to rescind the decree *nisi*, an order was made rescinding the decree *nisi* and dismissing the petition. But such order contained the provision that the co-respondent was to pay the *costs* of the petition as taxed.

Where a petitioner and his wife had entered into a separation deed in consequence of the respondent's intimacy with the co-respondent, and the wife committed

Damages
against
adulterer.

Petitioner
undischarged
bankrupt.
Death of co-
respondent.

Petitioner
guilty of
adultery.

Decree
rescinded.

Separation
deed.
Previous
intimacy

tioner himself, in order to facilitate proceedings under the Debtors Act, 1869. See *Patterson v. Patterson and Graham* (1870), L. R., 2 P. & D. 189; 40 L. J. P. 5; 23 L. T. 568; *Gyte v. Gyte and Mullineaux* (1885), 10 P. D. 185.

(*p*) *Blackett v. Blakett and Frail*, (1902) P. 170; 71 L. J. P. 69; 86 L. T. 669; overruling *Smith v. Smith and Patk* (1882), 7 P. D. 227; 47 L. T. 355.

(*q*) *Story v. Story and O'Connor* (1887), 12 P. D. 196; 57 L. J. P. 15; 57 L. T. 536. See also *Cox v. Cox and Warde*, (1906) P. 267; 75 L. J. P. 75; 95 L. T. 546.

(*r*) *Hyman v. Hyman and Goldman* (King's Proctor showing cause), (1904) P. 403; 73 L. J. P. 106; 91 L. T. 361.

(*s*) (1909) P. 187; 78 L. J. P. 97; 100 L. T. 744.

(*t*) (1911) P. 180.

Damages
against
adulterer.

—
with co-
respondent.

Respondent
of weak
intellect ;
adultery
committed
against
her will.

Measure of
damages,
wife earning
money.

Condonation.

Assignee of
damages.

adultery with the co-respondent subsequent to the date of the deed: the Court held that the husband was entitled to the same amount of damages as though no separation deed had been executed (*u*).

In a suit for dissolution the respondent did not appear, and the jury found a verdict for 50*l.* damages. The issue of the respondent's adultery being for the Court: Butt, J., having heard further evidence, found that the respondent had not committed adultery—the connection having been against her will—but gave judgment against the co-respondent for damages and costs (*x*).

In estimating the amount of damages, the fact that the wife was earning money, of a portion of which the petitioner had the benefit, may be taken into account (*y*).

It was formerly held in the Divorce Court that condonation was no bar to a claim for damages (*z*).

But the decisions in favour of this view were overruled by the Court of Appeal in 1893 (*a*).

Where a petitioner has assigned his damages the assignee has no right to intervene in the suit (*b*).

The subject of this chapter is further dealt with in Part II. of this work, tit. "Practice as to Damages" (p. 442).

(*u*) *Izard v. Izard and Leslie* (1889), 14 P. D. 45; 58 L. J. P. 83; 60 L. T. 399.

(*x*) *Long v. Long and Johnson* (1890), 15 P. D. 218; 60 L. J. P. 27.

(*y*) *Darbishire v. Darbishire and Baird* (1890), 62 L. T. 664.

(*z*) See *Pomero v. Pomero and Hadley* (1884), 10 P. D. 174; 54 L. J. P. 93; *Bernstein v.*

Bernstein, Sampson and Turner (1), (1892) P. 375; 62 L. J. P. 16; 67 L. T. 529.

(*a*) *Bernstein v. Bernstein, Sampson and Turner* (2), (1893) P. 292; 63 L. J. P. 3; 69 L. T. 513. See also *Cox v. Cox and Warde*, (1906) P. 267; 75 L. J. P. 75; 95 L. T. 546.

(*b*) *Hunt v. Hunt and Cooper*, (1894) P. 247; 63 L. J. P. 136.

CHAPTER VIII.

CUSTODY OF AND ACCESS TO CHILDREN.

By section 35 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), "In any suit or other proceeding for obtaining a judicial separation or a decree of nullity of marriage, and on any petition for dissolving a marriage, the Court may from *time to time*, before making its final decree, make such interim orders, and may make such provision in *the final decree*, as it may deem just and proper, with respect to the custody, maintenance, and education of the children, the marriage of whose parents is the subject of such suit or other proceeding, and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery." It was held that the Court, under this section, had no power to vary or alter an order as to the custody of children (*a*).

Custody and access.
Mat. C. Act, 1857, s. 35.
Interim orders.

Provision in final decree.

Court of Chancery.

The Court has jurisdiction to grant a decree of judicial separation where the parties are domiciled abroad, provided they are resident in England at the time of the commencement of the suit, and in such a case it has also power to make an order as to the custody of the children (*b*).

Parties domiciled abroad.
Judicial separation.

And by virtue of section 4 of the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), "The Court *after a final decree* of judicial separation, nullity of marriage, or dissolution of marriage, may, upon application (by petition)

Mat. C. Act, 1859, s. 4.
After final decree.

(*a*) *Curtis v. Curtis* (1858), 1 S. & T. 192; 27 L. J. P. 16.

(*b*) *Armstrong v. Armstrong*, (1898) P. 178; 67 L. J. P. 90; 78 L. T. 689.

Custody and
access.

—

for this purpose make, *from time to time*, all such orders and provision with respect to the custody, maintenance, and education of the children, the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the Court of Chancery, as might have been made by such final decree or by interim orders in case the proceedings for obtaining such decree were still pending; and all orders under this enactment may be made by the Judge Ordinary"—whose powers are now transferred by virtue of the Judicature Acts to the President of the Probate, Divorce and Admiralty Division—"alone or with one or more of the other judges of the Court."

In suits for
restitution of
conjugal
rights.

Mat. C. Act,
1884, s. 6.

By section 6 of the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), "The Court may, at any time before final decree on any application for restitution of conjugal rights, or after final decree if the respondent shall fail to comply therewith, upon application for that purpose, make from time to time all such orders and provisions with respect to the custody, maintenance, and education of the children of the petitioner and respondent as might have been made by interim orders during the pendency of a trial for judicial separation between the same parties."

Interim order
under above
section.

To save expense, the Court made an interim order under this section at the time of pronouncing a decree of restitution (*c*).

Guardianship
of Infants
Act, 1886, s. 7.

And by section 7 of the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), "In any case where a decree for judicial separation, or a decree either *nisi* or absolute for divorce, shall be pronounced, the Court pronouncing such decree may thereby declare the parent, by reason of whose misconduct such decree is made, to be a person unfit to have the custody of the children (if any) of the marriage; and, in such case, the parent so declared to be unfit shall not, upon the death of the other parent, be

Right of
Court to
declare guilty
party unfit
to have
custody of
child on
death of
innocent
parent.

entitled as of right to the custody or guardianship of such children." Custody and access.

So where a marriage was dissolved on the ground of the husband's adultery and aggravated cruelty, the Court inserted in the decree a declaration under this section (*d*). But before making an order under this section upon a wife's petition for judicial separation on the ground of her husband's adultery and desertion, the Court will require very strong evidence that he is a person unfit to have the custody of his children (*e*).

The Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), gives power to magistrates to make orders for the custody of children in cases coming before them. But all their orders are subject to an appeal to the Probate, Divorce and Admiralty Division (*f*).

Summary Jurisdiction (Married Women) Act, 1895.

In dealing with applications for custody of and access to children, the Court considers, first, what is for the benefit of the children; and secondly, the interests of the innocent party to the suit (*g*).

Interests of children first considered, then those of innocent party.

Whilst the guilt or innocence of the accused party is still in question, the Court will not, *except for good cause shown*, take away, even by an interim order, the common law right of the father to the custody of his children (*h*); but where it has been satisfied that the mother's health was being seriously affected by the loss of her children's

Common law right of father, whilst guilt or innocence of party still in question. Wife accused of adultery.

(*d*) *Skinner v. Skinner* (1888), 13 P. D. 90; 57 L. J. P. 104; 58 L. T. 923. See also *Robinson v. Robinson* (1886), 57 L. T. 118; *Handford v. Handford* (1890), 63 L. T. 256. See further as to effect of order made under this Act, *Manders v. Manders* (1890), 63 L. T. 627; *Webley v. Webley* (1891), 64 L. T. 839; *Hitchings v. Hitchings* (1892), 67 L. T. 530.

(*e*) *Woolnoth v. Woolnoth* (1902), 86 L. T. 598; *Skinner v. Skinner*, *supra*, distinguished.

(*f*) See *post*, Chap. XIV. (p. 212).

(*g*) *D'Alton v. D'Alton* (1878), 4 P. D. 87; 47 L. J. P. 59.

(*h*) *Cartlidge v. Cartlidge* (1862), 2 S. & T. 567; 31 L. J. P. 85; 6 L. T. 397. See also *Allen v. Allen and D'Arcy* (1859), 29 L. J. P. 166.

Custody and access.

Wife found guilty of adultery.

Court has absolute discretion as to access.

Access.

Interim order for, *pendente lite*.

Interest of child first considered.

society, the Court has given her the custody of them *pendente lite*, although she was accused of adultery (*i*).

It was formerly held that the Court would not give even access to children to a wife found guilty of adultery (*k*); but subsequently the Court of Appeal decided that there was no general rule of practice as to this, but that the Court had an absolute discretion in the matter (*l*).

Very early in the history of the Divorce Court it was decided that where a marriage was dissolved on the ground of the wife's adultery, the Court would make an order upon her to give up the custody of the children rather than put the husband to the expense of pursuing his rights at common law (*m*). And for many years past it has been the common practice of the Court to give the custody of the children to a successful petitioner in every case; at all events, in every case where the custody has been asked for in the petition, save under very exceptional circumstances.

The Court has also jurisdiction to order that one of the parties to the suit shall have access merely to the children of the marriage; and this jurisdiction it generally exercises *pendente lite*, by an *interim order* (*n*).

But where the Court in the matter of access to children was satisfied that the visits of the mother to the child, who was in a very sickly state, might retard the child's recovery, it refused her an order for access pending suit,

(*i*) *Barnes v. Barnes and Beaumont* (1867), L. R., 1 P. & D. 463. And in a later case in chambers the judge refused to deprive the mother of the custody of a girl over sixteen years of age pending suit: *B. v. B.* (1895), 72 L. T. 268.

(*k*) *Bent v. Bent and Footman* (1861), 2 S. & T. 392; 30

L. J. P. 175; 5 L. T. 139.

(*l*) *Handley v. Handley*, (1891) P. 124; 63 L. T. 535.

(*m*) *Boyd v. Boyd and Collins* (1859), 1 S. & T. 562; 29 L. J. P. 79.

(*n*) *Thompson v. Thompson and Sturmffells* (1861), 2 S. & T. 402; 31 L. J. P. 213; 5 L. T. 335.

though there was reason to apprehend that such refusal might injure her health (o). Custody and access.

The Court will, if the circumstances of the case warrant it, allow persons, who are not parties to a suit, to intervene and plead upon the question of the custody, maintenance and education of the children of parents, whose marriage is the subject of the suit (p), but they will do so at their own risk as to costs (q). Intervention of third parties.

The Court will decide each case according to its own circumstances, without regard to who has the right to the custody at common law (r). Discretionary power of Court as to custody.

It will require to be satisfied that the motive of the applicant is natural love and affection for the children, and that he or she has no indirect object in view (s). Motive of applicant.

Where the object of a wife who claimed the custody of the two children of the marriage was to bring them up in the Roman Catholic religion, they having been previously brought up as Protestants, the Court committed their custody to the mistress of the school in which their father had placed them, but gave to both parents full access to them (t). Where motive of applicant was to bring children up in Roman Catholic religion.

Where a wife, who was about to petition for a dissolution of her marriage, removed a child from home, the Court, on evidence that the husband's mother was on good terms with her daughter-in-law and attached to the Wife petitioner leaving child in custody of husband's mother.

(o) *Philip v. Philip* (1872), 41 (1889), 14 P. D. 162; 58 L. J. L. J. P. 89; 27 L. T. 592. P. 88.

(p) See *Chetwynd v. Chetwynd* (1865), L. R., 1 P. & D. 39; 34 L. J. P. 130; 4 S. & T. 151; 13 L. T. 197; *Godrich v. Godrich* (1873), L. R., 3 P. & D. 134; 43 L. J. P. 2; 29 L. T. 465. (r) See *Spratt v. Spratt* (1858), 1 S. & T. 215; *Marsh v. Marsh*, Ib. 312; 28 L. J. P. 13.

(s) *Codrington v. Codrington and Anderson* (1864), 3 S. & T. 496; 10 L. T. 387.

(q) *March v. March and Palumbo* (1867), L. R., 1 P. & D. 437. But see *Davis v. Davis* (1878), 4 P. D. 87; 47 L. J. P. 59.

Custody and access.

child of the marriage, ordered the custody of it to be given to her (*u*).

Neither parent fit to have custody.

Where the Court was of opinion that neither of the parents was fit to have the care of the children, it ordered that certain relatives who had intervened should have the custody of them, the parents being allowed reasonable access (*x*).

Custody given to grandfather.

Where a marriage was dissolved on the ground of the wife's adultery, the custody of the children was given to their paternal grandfather, the father being absent in India.

Attempt to get up charge of adultery against husband to obtain custody.

The Court views with disfavour an attempt to get up a charge of adultery against a husband who has obtained a decree dissolving his marriage, by tracking him from place to place, with a view to obtain an order depriving him of the custody of his children (*y*).

Children in mother's custody; father still allowed certain rights over them.

Where the Court has thought it right to give the custody of the children to the mother, it does not necessarily follow that it will go further and deprive the father of the power of exercising parental judgment and discrimination with regard to them, except so far as is inevitable from their remaining in the custody of the mother (*z*).

Wife successful in suit entitled to custody as a rule.

Where the wife succeeds in her suit, she is generally entitled to the custody of the children (*a*).

Disobedience to order.

Where the marriage had been dissolved on the wife's petition, but the custody of the child of the marriage had

(*u*) *Boynton v. Boynton* (1858), 1 S. & T. 324.

(*x*) *Chetwynd v. Chetwynd*, *supra* (previous page).

(*y*) *March v. March and Palumbo* (1867), L. R., 1 P. & D. 437.

(*z*) *Maudslay v. Maudslay* (1877), 2 P. D. 256; 47 L. J. P. 26; 38 L. T. 323.

(*a*) *Boynton v. Boynton* (1861), 2 S. & T. 275; 30 L. J.

P. 156; 4 L. T. 258. See also *Marsh v. Marsh* (1858), 1 S. & T. 312; 28 L. J. P. 13; *Martin v. Martin* (1860), 28 L. J. P. 106; *Suggate v. Suggate* (1859), 1 S. & T. 489; 29 L. J. P. 167; *March v. March and Palumbo*, *supra*. But for a case where the custody of a child was refused to a successful wife, see *Cooke v. Cooke* (1863), 3 S. & T. 248; 32 L. J. P. 180.

been given to the respondent with access to the wife upon certain terms, the respondent having refused his wife access as ordered, the Court gave her the custody of the child for a limited time (*b*).

Custody and access.
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Where a wife had obtained a decree for the dissolution of her marriage, together with an order for the custody of her children; on proof that the mother was leading a profligate life, the Court varied the order, and gave the custody of the children to the father, in spite of the fact that he had been found guilty of adultery (*c*).

On subsequent misconduct of petitioner custody given to respondent, against whom a decree absolute for dissolution had been made.

In arriving at decision in this case, the Court was guided by the authority of the House of Lords in a Scotch case (*d*), the ultimate result of which was that the custody of the sons was given to the father and that of the daughters to the mother.

Scotch case, where House of Lords gave custody of boys to guilty father and girls to innocent mother.

In the case of *Reg. v. Howes* (*e*), the Court of Queen's Bench decided that a father had a right to claim the custody of his children by legal process up to the age of sixteen. Until quite recently the Court of Divorce has adopted this age as the limit up to which it would deal with applications for the custody and maintenance of children (*f*).

Reg. v. Howes.

Age at which right to custody ceased till recently.

From 1894 to 1909, however, the Court has made orders for the custody and maintenance of children up to the age

Limit of age.

(*b*) *Portugal v. Portugal* (1866), 35 L. J. P. 103. And see further as to custody in suits for judicial separation, *Milford v. Milford* (1869), L. R., 1 P. & D. 715; 38 L. J. P. 63; 21 L. T. 155; *Anthony v. Anthony* (1860), 30 L. J. P. 208; *Prescott v. Prescott* (1868), 18 L. T. 103.

(*c*) *Witt v. Witt*, (1891) P. 163; 60 L. J. P. 63; 64 L. T. 121.

(*d*) *Symington v. Symington* (1875), L. R., 2 Sc. & Div. 415.

(*e*) (1860), 30 L. J., M. C. 47; and (*nom. Barford, Ex parte*) 8 Cox, C. C. 405; 3 L. T. 467.

(*f*) See *Mallinson v. Mallinson* (1866), L. R., 1 P. & D. 221; 35 L. J. P. 84; 14 L. T. 636; *Ryder v. Ryder* (1861), 2 S. & T. 225; 30 L. J. P. 44; 3 L. T. 678; *Webster v. Webster* (1862), 31 L. J. P. 184; *Blandford v. Blandford*, (1892) P. 148; 61 L. J. P. 97; 67 L. T. 392.

Custody and
access.

of twenty-one years (*g*), but the Court of Appeal in 1909 in a case where the child was sixteen held that the Court ought not to lay down a hard and fast rule, but that the statutory power conferred upon the Court ought to be exercised at the discretion of the Court according to the particular circumstances of each case; and here where the daughter aged sixteen left her father to live with the guilty mother, the Court refused to compel her to return to her father (*h*).

Petition
dismissed.
No jurisdic-
tion as to
custody or
access.
Sanity of
wife.

The Court has no power to make an order as to children where a petition is dismissed (*i*).

Where an application by the wife for the custody of children was opposed on the ground that she was not of sound mind and the medical evidence was conflicting, the Court directed her to be examined by a physician nominated by itself, and on his certificate gave her the custody of the children (*k*).

Prayer for
custody in
petition.

Where it is intended to ask for the custody of children, words to that effect should be inserted in the prayer of the petition (*l*).

Paternity of
child, ques-
tion as to,
must be
raised on
pleadings.

Where the respondent desires to question the paternity of children, whose custody is claimed in a petition, the question of such paternity must be specifically raised in the answer; otherwise the party opposing the custody will not in future be allowed, at the hearing, to question the paternity (*m*).

Respondent
alleging
illegitimacy

Where a wife respondent alleged that a child born during the marriage was the child, not of the petitioner

(*g*) *Thomasset v. Thomasset*,
(1894) P. 295; 63 L. J. P. 140;
71 L. T. 148.

(*h*) *Mozley-Stark v. Mozley-
Stark (now Hitchins) and
Hitchins*, (1910) P. 190; 101
L. T. 770 (C. A.); 79 L. J. P.
98.

(*i*) *Seddon v. Seddon and
Doyle* (1862), 2 S. & T. 640; 31

L. J. P. 101; 7 L. T. 253.

(*k*) *Duggan v. Duggan* (1859),
29 L. J. P. 159.

(*l*) *Boddy v. Boddy and
Grover* (1860), 30 L. J. P. 163;
Seymour v. Seymour (1859), 1
S. & T. 332.

(*m*) *Gordon v. Gordon and
Bell*, (1903) P. 92; 72 L. J. P.
34; 88 L. T. 573.

but of the co-respondent, and desired the custody of it on that ground: the Court held that she must show that her husband could not have had such access to her as might result in his paternity; otherwise the presumption of legitimacy must prevail (*n*).

Custody and access.

of child of marriage must prove non-access to succeed.

Where a respondent does not appear after he has been duly served with a petition containing a prayer for custody, he is not entitled to any further notice of the application (*o*).

Respondent not appearing.

In an Irish Divorce Bill, although no separate action has been instituted in Ireland for the custody of children, the House of Lords will sanction a clause giving the custody of the children to the innocent party (*p*).

Rule as to custody in Irish bill for divorce.

The statutory power of the Court as to maintenance and education of children after decree is not affected by any agreement made between the parents (*q*).

Agreement between parties as to custody.

For the time at and mode in which applications as to custody, access to, and maintenance of children should be made, see Part II., "Practice as to Custody of and Access to Children" (p. 444). See also "Costs," *post*, Chap. XVI. (p. 228).

(*n*) *Gordon v. Gordon and Granville Gordon*, (1903) P. 141; 72 L. J. P. 33; 89 L. T. 73.

(*p*) *Hart's Divorce Bill*, (1898) A. C. 305—H. L. (Ir.).

(*o*) *Wilkinson v. Wilkinson* (1861), 30 L. J. P. 200, n.

(*q*) *Bishop v. Bishop*, (1897) P. 138; 66 L. J. P. 69; 76 L. T. 409.

CHAPTER IX.

ALIMONY AND MAINTENANCE.

Alimony and maintenance. THE provision made by the Court for a wife who is a party to a matrimonial suit is either *temporary* or *permanent*.

The first is the provision that is made to enable her to live during the progress of the suit, and is generally spoken of as "*alimony pendente lite*" or "*alimony pending suit*."

Pendente lite. The second is the provision that is made for her after the final decree has been pronounced, and is spoken of as "*permanent maintenance*" or "*permanent alimony*."

Permanent. The word "*maintenance*" is used when the permanent provision for a wife after a decree of dissolution is intended; the expression "*permanent alimony*" means the permanent provision for the wife in all other suits.

Definition of terms. By section 32 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), "The Court may, if it shall think fit, on any such decree," (*i.e.*, for dissolution of marriage,)

Mat. C. Act, 1857, s. 32. "order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life (*a*), as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable, and for that purpose may

Power to settle gross or annual sum after decree of dissolution.

(*a*) It has been decided by the Court of Appeal that the Court has an absolute discretion under this section to order payment to

the wife as long as she remains unmarried only, if it seems right so to do: *Lister v. Lister* (1890), 15 P. D. 4; 62 L. T. 90.

refer it to any one of the conveyancing counsel of the Court of Chancery to settle and approve of a proper deed or instrument to be executed by all necessary parties; and the said Court may in such case, if it shall see fit, suspend the pronouncing of its decree until such deed shall have been duly executed; and upon any petition for dissolution of marriage the Court shall have the same power to make *interim orders* for payment of money, by way of alimony or otherwise, to the wife, as it would have in a suit instituted for judicial separation.” The effect of this section and of the rules and regulations made under the provisions of the Divorce Acts is to enable the Court, before a decree *nisi* for divorce has been made absolute, to confirm the report of the registrar approving of maintenance for the wife, to order the husband to secure the maintenance to the wife before decree absolute, and in the meantime to restrain him from dealing with his property so as not to leave sufficient security (*b*).

Alimony and
maintenance.

Effect of
section.

Interim orders.

The Matrimonial Causes Act, 1866 (29 & 30 Vict. c. 32), after reciting in the preamble that “. . . it sometimes happens that a decree for a dissolution of marriage is obtained against a husband who has no property on which the payment of any such gross or annual sum can be secured, but nevertheless he would be able to make a monthly or weekly payment to the wife during their joint lives”: proceeds by section 1 to enact, “In every such case it shall be lawful for the Court to make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance and support as the Court may think reasonable: Provided always, that if the husband shall afterwards from any cause become unable to make such payments it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend the same as to the whole or any

Mat. C. Act,
1866, s. 1.

Power to
order
monthly or
weekly pay-
ments to wife
from husband
on dissolution
of marriage.

(*b*) *Waterhouse v. Waterhouse*, (1893) P. 284; 62 L. J. P. 115; 69 L. T. 618.

Alimony and
maintenance.

part of the money so ordered to be paid, and again to revive the same order, wholly or in part, as to the Court may seem fit."

Mat. C. Act,
1857, s. 6.
Power to
award
alimony.
Whence
derived.

In cases other than suits for dissolution the Court derives its power to order alimony—whether *pendente lite* or permanent—from section 6 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), by which ". . . all jurisdiction now vested in or exerciseable by any ecclesiastical court or person in England in respect of divorces *a mensâ et thoro*, suits of nullity of marriage, suits for restitution of conjugal rights, or jactitation of marriage, and in all causes, suits, and matters matrimonial, except in respect of marriage licences, . . ." is transferred to the Divorce Court.

Ibid. s. 22.
On what
principles
exercised.

The power thus derived by inference of making provision for a wife in these suits is that of the Ecclesiastical Courts only, and by section 22 of the same Act it must be exercised ". . . on principles and rules which, in the opinion of the Court, shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief,"

Alimony
pendente lite,
when payable
in the Ecclesi-
astical Courts.
Pendente lite,
practice of
Ecclesiastical
Courts.

According to the practice of the Ecclesiastical Courts, alimony *pendente lite* was payable from the return of the citation (*d*).

The question of alimony *pendente lite* was disposed of at the first stage of the proceedings (*e*).

The ceremony of marriage had first to be established (*f*), and this having been done, alimony followed as a matter of course, except where the wife had a sufficient provision of her own (*g*).

(*d*) *Bain v. Bain* (1824), 2
Add. 253; *Hamerton v. Hamer-*
ton, (1827), 1 Hagg. 23.

Hagg. Con. C. 199.

(*f*) *Smyth v. Smyth* (1824), 2
Add. 254.

(*e*) *Brisco v. Brisco* (1816), 2

(*g*) *Miles v. Chilton* (*falsely*

The nature of the suit did not affect the wife's right to alimony *pendente lite*. She was as much entitled to it in suits of nullity as in other suits (*h*).

In setting out particulars of the husband's income, the wife was allowed to plead any *reversionary* interests he might be possessed of, but not a mere expectancy (*i*).

The husband's answer to a petition for alimony was regularly taken to be strongly against him (*k*).

The Ecclesiastical Courts generally allotted as alimony *pendente lite* one-fifth of the husband's income, but they were guided by circumstances, such as the rank and condition of the husband (*l*), and whether he had the children of the marriage to support (*m*), or whether the wife had a separate income (*n*); and the amount allotted was reduced when it was shown that the husband was no longer able to *aliment* at the same rate (*o*).

The reduction of the husband's income by unprofitable speculation was held to be no ground for a proportionate reduction of permanent alimony (*p*). A fraudulent assignment by the husband of his property after the commencement of the suit was disregarded by the Court (*q*). A wife's extravagance was taken into consideration by the Ecclesiastical Courts (*r*), and they allowed the husband to deduct from her alimony *pendente lite* any sums paid by

Alimony
pendente lite.

Nature of
suit.

Particulars of
husband's
income.

Husband's
answer.

Amount
allowed.
Liable to
reduction in
certain cases.

In what cases
liable to
reduction.

calling herself Miles) (1849), 1 Robert. 700. See two Irish cases, *Butler v. Butler* (1842), Milw. Ir. Ecc. Rep. 629; *Finlay v. Finlay*, Ib. 575, where the wife's original station in life was considered in allotting alimony.

(*h*) *Miles v. Chilton (falsely calling herself Miles)* (1849), 1 Rob. 700; *Bird (alias Bell) v. Bird* (1753), 1 Lee, 209.

(*i*) *Stone v. Stone* (1843), 3 Curt. 341.

(*k*) *Robinson v. Robinson* (1728), 2 Lee, 593.

(*l*) *Hawkes v. Hawkes* (1828), 1 Hagg. 526.

(*m*) *Harris v. Harris* (1828), 1 Hagg. 353.

(*n*) *Smith v. Smith* (1813), 2 Phill. 152.

(*o*) *Cox v. Cox* (1826), 3 Add. 276.

(*p*) *Neil v. Neil* (1832), 4 Hagg. 273.

(*q*) *Brown v. Brown* (1828), 2 Hagg. 5.

(*r*) *Brisco v. Brisco* (1816), 2 Hagg. C. C. 201.

Alimony
pendente lite.

him on account of her debts (*s*). He might also deduct income tax (*t*), but he was not allowed to deduct premiums payable on a policy of life insurance (*u*).

Circumstances
of case con-
sidered.

The nature of the complaint was sometimes taken into consideration (*x*).

Arrears
beyond one
year not
enforced
without
special cir-
cumstances.

The Ecclesiastical Courts allotted alimony for the main-
tenance of the wife *from year to year*; therefore they
would not enforce arrears beyond one year (*y*), except
under special circumstances (*z*).

There was a material distinction between permanent
alimony and alimony *pendente lite*, the former being
always larger (*a*).

When
payment
commenced.

The rule of the Court was to decree permanent alimony
from the date of the sentence (*b*), though this was not an
invariable rule (*c*).

Appeal inter-
posed.

And where an appeal was interposed, the alimony still
continued (*d*).

Pendente lite,
practice since
1857.

Alimony *pendente lite* now ceases upon a verdict finding
the wife guilty of adultery, unless otherwise ordered by
the Court (*e*).

(*s*) *Hamerton v. Hamerton*
(1827), 1 Hagg. 23; *Harris v.*
Harris, *Ib.* 253.

(*t*) *Pemberton v. Pemberton*
(1842), 2 No. of Cas. 17.

(*u*) *Harris v. Harris* (see pre-
vious page).

(*x*) *Rees v. Rees* (1821), 3
Phill. 389.

(*y*) *Wilson v. Wilson* (1830), 3
Hagg. 329 (notis).

(*z*) *Robinson v. Robinson*
(1728), 2 Lee, 593.

(*a*) *Kempe v. Kempe* (1828),
1 Hagg. 532. As to deductions
allowed to husband in estimating
permanent alimony, see *West-
meath v. Westmeath* (1834), 3
Knapp, P. C. C. 42; and as to
permanent alimony where decree

of nullity pronounced on ground
of bigamy, see *Bird (alias Bell)*
v. Bird (1753), 1 Lee, 621.

(*b*) *Cooke v. Cooke* (1812), 2
Phill. 41; *Durant v. Durant*
(1825), 1 Hagg. 528.

(*c*) *Taylor v. Taylor* (Arches
Court, May 14th, 1796), cited in
Cooke v. Cooke, supra.

(*d*) *Loveden v. Loveden*
(1810), 1 Phill. 208. See also
Brisco v. Briseo (1820), 3 Phill.
206; *Frankfort v. Frankfort*
(1844), 3 No. of Cas. 432.

(*e*) *Dunn v. Dunn* (1888), 13
P. D. 91; 57 L. J. P. 58; 59
L. T. 385. (*Wells v. Wells and*
Hudson (1864), 33 L. J. P. 151;
3 S. & T. 542; 10 L. T. 696, dis-
cussed.)

The Court refused to make any order for alimony *pendente lite* after decree *nisi* in a case where the wife was found guilty of adultery, and there had been no previous application (*f*).

The fact that there is a plea to the jurisdiction of the Court does not affect the power of the Court to allot alimony *pendente lite* (*g*).

Alimony *pendente lite* is payable from the date of the service of the citation (*h*).

Where the respondent cohabited with the co-respondent for some time after the commencement of proceedings, the Court ordered that the alimony should run from the date at which such cohabitation ceased (*i*).

Where a wife petitioner was found guilty of adultery on the intervention of the Queen's Proctor, the Court held that she was entitled to payment of the arrears of alimony up to the date when she was so found guilty (*k*).

A decree *nisi* was rescinded and the petition dismissed, and the wife appealed. In the meantime, the husband had ceased to pay alimony. The Court refused to enforce the arrears against the husband, but renewed the order for alimony until further notice (*l*).

A wife's conviction for felony does not disentitle her to an order for alimony *pendente lite* (*m*); but see *Leslie v. Leslie* (*n*), where it was held that *permanent* alimony was not payable so long as the wife remained in prison.

Alimony
pendente lite.

Wife found
guilty of
adultery.

Unreasonable
delay.

Where plea
to the juris-
diction.

When
payment
commences.

Respondent
and co-
respondent
cohabiting.

Wife
committing
adultery
whilst suit
pending.

Appeal;
arrears.

Wife
convicted of
felony.

(*f*) *Noblett v. Noblett and Kershaw* (1869), L. R., 1 P. & D. 651; 20 L. T. 716. See also, as to the effect of unreasonable delay, *Twistleton v. Twistleton and Kelly* (1872), L. R., 2 P. & D. 339; 26 L. T. 265.

(*g*) *Ronalds v. Ronalds* (1875), L. R., 3 P. & D. 259.

(*h*) *Nicholson v. Nicholson and Ratcliffe* (1862), 31 L. J. P. 165.

(*i*) *Holt v. Holt and Davis*

(1868), L. R., 1 P. & D. 610; 38 L. J. P. 33; 16 L. T. 662.

(*k*) *Whitmore v. Whitmore* (1866), L. R., 1 P. & D. 96; 35 L. J. P. 39; 13 L. T. 723.

(*l*) *Butler v. Butler and Burnham* (1889), 15 P. D. 13; 59 L. J. P. 11; 62 L. T. 123.

(*m*) *Kelly v. Kelly* (1863), 4 S. & T. 227; 32 L. J. P. 181.

(*n*) (1908) P. 99; 77 L. J. P. 23; 98 L. T. 62; (1911) P. 203.

Alimony
pendente lite.

Alimony
payable until
decree
absolute.

Order for
alimony after
decree *nisi*.
1899.

Marriage
clearly
bigamous.

Application
for small sum
pending hear-
ing of petition
for alimony.

Husband
having no
means.

Average
earnings,
husband out
of employ-
ment.

Voluntary
allowance to
husband.

In a suit of nullity, alimony continues payable after the decree *nisi* until the decree is made absolute (*o*); and the Court has jurisdiction to make an order for alimony at any time before decree absolute (*p*).

In a case where the marriage was clearly bigamous, the Court relieved the petitioner from payment of alimony *pendente lite* as soon as it had pronounced a decree *nisi* (*q*).

The Court refused to entertain an application by a wife petitioner for a small sum of money, pending the hearing of her petition for alimony, on the ground that she was destitute.

Where it appears that the husband has no means, or very small means, the Court will refuse to allot alimony *pendente lite* (*s*).

But alimony is sometimes allotted on the average annual earnings of a husband although at the moment he may be temporarily out of employment (*t*).

In the allotment of alimony, a voluntary annual allowance made to the husband forms no part of his facul-

(*o*) *S. (falsely called B.) v. B.* (1884), 9 P. D. 80; 53 L. J. P. 63.

(*p*) *Foden v. Foden*, (1894) P. 307; 63 L. J. P. 163; 71 L. T. 279; and for a case where alimony refused when marriage plainly null and void on face of petition and answer, see *Blackmore v. Mills (falsely called Blackmore)* (1868), 18 L. T. 586.

(*q*) *Childers v. Childers (otherwise Burford)* (1899), 68 L. J. P. 90. See also *Bateman v. Bateman (otherwise Harrison)* (1898), 78 L. T. 472.

(*s*) *Gaynor v. Gaynor* (1862), 31 L. J. P. 144; *Capstick v. Cap-*

stick, Furness and Winder (1864), 33 L. J. P. 105; *Coombs v. Coombs* (1866), L. R., 1 P. & D. 218; 14 L. T. 294; *Beavan v. Beavan* (1862), 2 S. & T. 652; 31 L. J. P. 166; 7 L. T. 435; *Brown v. Brown and Simpson* (1863), 3 S. & T. 217; 32 L. J. P. 144; 9 L. T. 118; *Fletcher v. Fletcher* (1862), 2 S. & T. 434; 31 L. J. P. 82; 6 L. T. 134. See also *Ward v. Ward* (1859), 1 S. & T. 484; 29 L. J. P. 17.

(*t*) *Thompson v. Thompson and Johnson* (1867), L. R., 1 P. & D. 553; 37 L. J. P. 33; 18 L. T. 212.

ties (*u*), though alimony is sometimes given to a wife out of income to which the husband has no strict legal right (*x*), as in a case where the husband was in receipt of an allowance so long as he should remain out of the country (*y*). But all the valuable property of the husband will be taken into account, although he derives no income from it at the moment (*z*).

Alimony
pendente lite.

All valuable
property
taken into
account.

The amount of alimony *pendente lite* allotted is now invariably one-fifth of the *joint income* of the husband and wife, except under peculiar circumstances, as, for example, where the income of the husband is so great as to make one-fifth an utterly unnecessary amount (*a*).

Rule as to
rate of
alimony
pendente lite.

The circumstance that the husband has to maintain several children, *the issue of a former marriage*, is no ground for allotting less than one-fifth of the joint income (*b*).

Supporting
the children.

A husband is liable for necessities supplied to his wife pending the suit, till a decree for alimony is made, but only to a reasonable amount. He may deduct from income derived from real property the expense of ordinary current repairs, but not of extraordinary and permanent improvements (*c*).

Husband
liable for
reasonable
expenses of
wife until
decree for
alimony
made.

The institution of vexatious suits by the wife against the husband is a ground for allotting alimony *pendente*

Vexatious
suits by wife.

(*u*) *Haviland v. Haviland* 26 L. T. 108.

(1863), 3 S. & T. 114; 32 L. J. P. 67; 7 L. T. 757. See also (*a*) See *Edwards v. Edwards* (1868), 17 L. T. 584.

Moss v. Moss and Bush (1867), 15 W. R. 532. (*b*) *Hill v. Hill* (1864), 33 L. J. P. 104. See also *Grafton v. Grafton* (1872), 27 L. T. 768.

(*x*) *Clinton v. Clinton* (1866), L. R., 1 P. & D. 215; 14 L. T. 257. (*c*) *Hayward v. Hayward* (1858), 1 S. & T. 85; 28 L. J. P. 9; and see further as to husband, *Hooper v. Hooper* (1863), 29 L. J. P. 59; 3 S. & T. 251; *Avila v. Avila* (1862), 31 L. J. P. 176; *Keegan v. Smith* (1826), 8 D. & R. 118; 5 B. & C. 375.

(*y*) *Bonsor v. Bonsor*, (1897) P. 77; 66 L. J. P. 85; 76 L. T. 168.

(*z*) *Crampton v. Crampton and Armstrong* (1863), 32 L. J. P. 142; *Wilson v. Wilson* (1872),

Alimony
pendente lite.

lite at a lower rate (*d*). And where the hearing of a suit by the wife for judicial separation was postponed at the wife's instance, the Court directed the payment of alimony *pendente lite* to be suspended from the date of the postponement until the hearing (*e*).

Wife's
earnings.

In allotting alimony *pendente lite* the wife's earnings and power of maintaining herself must be taken into consideration (*f*), especially where the parties are very poor (*g*).

Husband and
wife living
apart.

Wife's power
of earning
money.

Wife's means
of support.

Where the husband and wife have been living apart for many years, and the wife has been supporting herself, and is still able to do so, alimony *pendente lite* will not be allotted, except under special circumstances (*h*).

Where the wife has sufficient means of support independent of the husband, even although they be derived from the co-respondent, she will not be entitled to an allotment of alimony (*i*).

Charge of
prostitution
against wife.

The Court refused to rescind an order for alimony *pendente lite* on a sworn allegation that the wife was a prostitute; the wife, in her affidavit, denying the truth of the allegation (*k*).

Deed of
separation.

Where a husband had, under a deed of separation, paid his wife a certain allowance until he obtained evidence of her adultery, the Court ordered alimony *pendente lite* at the same rate (*l*).

(*d*) *Hakewill v. Hakewill* (1860), 30 L. J. P. 254.

(*e*) *Rogers v. Rogers* (1865), 34 L. J. P. 87.

(*f*) *Goodheim v. Goodheim and Frankinson* (1861), 30 L. J. P. 162; 2 S. & T. 250; 4 L. T. 449.

(*g*) *Nicholls v. Nicholls* (1861), 30 L. J. P. 163 (n.).

(*h*) *Thompson v. Thompson and Johnson* (1867), L. R., 1 P. & D. 554; 37 L. J. P. 17.

(*i*) *Madan v. Madan and De*

Thoren (1868), 37 L. J. P. 10; 18 L. T. 337; *Holt v. Holt and Davis* (1868), L. R., 1 P. & D. 610; *Eaton v. Eaton and Campbell* (1870), L. R., 2 P. & D. 51; 21 L. T. 733.

(*k*) *Patch v. Patch* (1869), 38 L. J. P. 27; 19 L. T. 662.

(*l*) *Weber v. Weber and Pyne* (1858), 1 S. & T. 219. See also *Powell v. Powell and Jones* (1874), L. R., 3 P. & D. 186; 43 L. J. P. 9; 29 L. T. 466.

And where, by a separation deed, a husband covenanted to make an allowance to the wife, determinable upon her molesting him, and subsequently withdrew it in consequence of her molestation, whereupon she commenced a suit for judicial separation, the Court of Appeal held that she was entitled to alimony at the same rate (*m*).

Alimony
pendente lite.

Agreement
not to molest
in separation
deed, sub-
sequent suit
for judicial
separation.

Protection
order.

By obtaining a protection order the wife does not deprive herself of her right to alimony *pendente lite* in a subsequent suit (*n*).

Generally, payments made to a wife, or on account of her debts, or otherwise to her benefit since the service of the citation, are allowed to the husband as part payment of the alimony allotted (*o*).

Payments
made for wife
since citation.

If a husband has contracted to pay off a debt by instalments, they will be allowed for in estimating his income (*p*).

Instalments
of a debt.

The Court has power to order alimony *pendente lite*, notwithstanding a decree *nisi* has been made for dissolution of marriage (*q*).

Power to
order alimony
after a decree
nisi.

Alimony is payable to the wife pending an appeal, unless it shall appear to the Court that such appeal is frivolous and vexatious, or that she has been guilty of *laches* (*r*).

During
appeal.

(*m*) *Wood v. Wood* (1888), 57 L. J., Ch. 1; Ib. P. 31; 57 L. T. 746. This case was an appeal from a decision of Kekewich, J., sitting as *vacation* judge. This probably will account for its being reported in the *Law Journal* in the Chancery as well as in the Probate, Divorce and Admiralty Reports. The case, however, belongs exclusively to the Probate Division.

(*n*) *Hakewill v. Hakewill* (1860), 30 L. J. P. 254. See *post*, Chap. X.

(*o*) *Crampton v. Crampton and Armstrong* (1863), 32 L. J. P.

142.

(*p*) *Patterson v. Patterson, Curtis and Dore* (1863), 33 L. J. P. 36; but see as to premiums on policies of life insurance, *Forster v. Forster and Thomas* (1862), 2 S. & T. 553; 31 L. J. P. 184; 6 L. T. 693.

(*q*) *Ellis v. Ellis* (1883), 8 P. D. 188; 52 L. J. P. 99; 49 L. T. 223; *Nicholson v. Nicholson* (1863), 32 L. J. P. 127; 9 L. T. 118.

(*r*) *Jones v. Jones* (1872), L. R., 2 P. & D. 333; 41 L. J. P. 53; 4 S. & T. 144; 26 L. T. 106.

Alimony
pendente lite.

Application
to reduce
amount.

Arrears.

Order XIV.

Bankruptcy.

Purely
personal
allowance.

Permanent;
practice as to,
since 1857.
Powers of
Court.

Where a husband applies to reduce the amount of alimony *pendente lite* on the ground that his income has become reduced since the date of the order, he must explain such reduction (s).

A claim for arrears of alimony *pendente lite* is not a claim for "a debt or liquidated demand in money" within the meaning of Order III. Rule 6, so as to entitle the plaintiff to judgment under Order XIV. Rule 1 (t).

Arrears of alimony which have accrued due after the date of a receiving order made against the husband and before proof are not provable in bankruptcy (u); but, as such arrears constitute a debt enforceable under section 5 of the Debtors Act, 1869, they can be enforced by a committal order on proof of means (x).

It was decided by the Court of Appeal, in 1896, that sums of money ordered, under section 1 of the Matrimonial Causes Act, 1866 (29 & 30 Vict. c. 32), to be paid by a husband for the maintenance of his divorced wife, are a purely personal allowance, and so long as the order subsists can neither be alienated nor released (y).

The power possessed by the Probate, Divorce and Admiralty Division of making orders for the *permanent alimony* or *maintenance* of a wife is threefold, viz.: (1) the power to order a gross or annual sum of money to be secured to the wife for a term not exceeding her own life,

(s) *Shirley v. Wardrop* (falsely called *Shirley*) (1858), 1 S. & T. 317; 33 L. T., O. S. 198.

(t) *Bailey v. Bailey* (1884), 13 Q. B. D. 855; 53 L. J., Q. B. D. 583.

(u) *Hawkins, In re, Hawkins, Ex parte*, (1894) 1 Q. B. 25; 69 L. T. 769. See also *Otway, In re, Otway, Ex parte* (1888), 58 L. T. 885; *Linton, In re, Linton, Ex parte* (1885), 15 Q. B. D. 239; 54 L. J., Q. B. 529; 52

L. T. 782; *Prescott v. Prescott* (1868), 20 L. T. 331.

(x) *Kerr v. Kerr*, (1897) 2 Q. B. 439; 66 L. J., Q. B. 838; 77 L. T. 29; and see, as to a bankrupt who obtained an order of discharge under one of the older Bankruptcy Acts, *Dickens v. Dickens*, 2 S. & T. 645; 31 L. J. P. 183; 7 L. T. 395.

(y) *Watkins v. Watkins*, (1896) P. 222; 65 L. J. P. 75; 101 L. T. 158.

conferred upon it by section 32 of the Matrimonial Causes Act, 1857; (2) the power of ordering the husband to make monthly or weekly payments to the wife in cases of dissolution, conferred upon it by section 1 of the Matrimonial Causes Act, 1866; (3) the power it possesses of ordering provision to be made for a wife in all matrimonial causes other than suits for dissolution by virtue of the jurisdiction of the Ecclesiastical Courts transferred to it by section 6 of the Matrimonial Causes Act, 1857.

Alimony and maintenance.

Mat. C. Act, 1857, s. 32.

Ibid. 1866, s. 1.

Ibid. 1857, s. 6.

It must be borne in mind that, as in the case of alimony *pendente lite*, the Court in making a permanent provision for the wife is *bound by the practice of the Ecclesiastical Courts in all matrimonial causes other than suits for dissolution of marriage*, except so far as this rule may be modified with respect to suits for restitution of conjugal rights by the provisions of the Matrimonial Causes Act, 1884, as to which see *ante*, Chap. IV.

Practice of Ecclesiastical Courts, when binding.

In suits for restitution the Court will not, at the hearing, consider any question as to what allowance the respondent should be ordered to pay his wife in the event of a decree being pronounced and of his refusing to comply therewith (z).

Refusal to consider question of amount before decree.

It was for a long time supposed that the Court had no power to make an order for the permanent maintenance of a wife after a decree absolute had been pronounced. The contrary was, however, decided by Sir James Hannen in 1878 (a).

Maintenance order may be made after decree absolute.

Under the Matrimonial Causes Act, 1857, s. 32 (20 & 21 Vict. c. 85), the Court has no power to order that a sum of money standing in the names of the husband and wife in a savings bank should be paid to the wife, but it can order the husband to secure the same to the wife (b).

Money in savings bank.

(z) *Mason v. Mason* (1889), L. T. 203.

61 L. T. 304.

(b) *Robotham v. Robotham*

(a) *Bradley v. Bradley* (1878), (1858), 1 S. & T. 190; 27 L. J.

3 P. D. 47; 47 L. J. P. 53; 39 P. 61.

Alimony and maintenance.

Limit of amount after a decree of judicial separation. Court will not bind husband's property irrevocably.

Being bound by the practice of the Ecclesiastical Courts, the Court cannot in a suit for judicial separation allot more than one moiety of the joint income to the wife by way of permanent alimony, although she may have brought more than one moiety of the property into settlement (*c*); neither can it make such an order as would have the effect of charging the husband's property with payment of permanent alimony, whatever alteration might take place in his circumstances at any future time (*d*).

Where a wife's conduct before and after marriage has been reprehensible (although she was not guilty of any matrimonial offence), if she has no means of support, the husband is bound to allow her a sum which will enable her to live a respectable life. She is not entitled, however, to any particular portion of his income merely because she has proved him guilty of a matrimonial offence (*e*).

Moiety of income awarded.

Where the only income of the husband was 60*l.* a year, and he had turned his wife out, and his mistress was living with him, the Court awarded a moiety of his income as permanent alimony (*f*).

One-fourth plus provisions for children awarded.

Where the wife had the custody of three children, and the husband's income was estimated at 400*l.* a year, the Court awarded her 160*l.* as permanent alimony, 100*l.* for herself and 20*l.* for each of the children (*g*).

Reduction of order.

If his income fails, the husband can apply for a reduction of alimony (*h*).

(*c*) *Haigh v. Haigh* (1869), 99; 77 L. J. P. 23; 98 L. T. 62; L. R., 1 P. & D. 709; 38 L. J. P. 203.
(*d*) *Hyde v. Hyde* (1865), 4 S. & T. 80; 34 L. J. P. 63; 12 L. T. 235. See *Carter v. Carter*, (1896) P. 35; 65 L. J. P. 40, where the above case is cited in the judgment of Gorell Barnes, J.

(*e*) *Leslie v. Leslie*, (1908) P. 11 L. T. 459.
(*f*) *Avila v. Avila* (1862), 31 L. J. P. 176.
(*g*) *Whieldon v. Whieldon* (1861), 2 S. & T. 388; 30 L. J. P. 174; 5 L. T. 138.

(*h*) *Moore v. Moore* (1864), 3 S. & T. 606; 34 L. J. P. 146; 11 L. T. 459.

It has been decided by the Court of Appeal that the Court has jurisdiction to order permanent alimony to be paid to a guilty wife in suits for judicial separation (*i*).

Alimony and maintenance.

The deductions allowed in estimating the amount of the husband's income for the purposes of permanent alimony or maintenance are the same as are allowed in estimating it for alimony *pendente lite*.

Permanent, guilty wife. Deductions allowable.

The Court will, as a rule, in the absence of special circumstances, order the husband to secure about one-third of the joint income to a wife whose marriage has been dissolved on her own petition as permanent maintenance (*k*).

Maintenance, wife petitioner, amount, general rule, one-third.

Where the husband's income was 150*l.* a year, the Court ordered him to pay the wife 1*l.* per week, together with 30*l.* a year for the maintenance and education of two children who were in her custody (*l*).

Ibid.

But the rule that one-third of the joint income of the husband and wife should be allotted as permanent maintenance does not apply where such income is very large. In such a case a fair test is what would be considered an adequate jointure for the wife (as widow) in case of her husband's death (*m*).

Where husband's income large.

In *Morris v. Morris* (*n*) the Court ordered the husband to secure to his wife the payment of the sum of 2,000*l.* absolutely; and this case was followed in 1898 (*o*).

Payment of lump sum ordered. 1898.

But in 1903, Sir Francis Jeune—after considering and

No power to order gross

(*i*) *Goodden v. Goodden*, (1892) P. 1; 65 L. T. 542. See also *L. v. L.*, (1911) P. 203; 104 L. T. R. 462, for general principles upon which alimony is to be granted.

18 L. T. 35.

(*k*) *Sidney v. Sidney* (1865), 4 S. & T. 178; 34 L. J. P. 122; 12 L. T. 826. See also *Fisher v. Fisher* (1861), 2 S. & T. 410; 31 L. J. P. 1; 5 L. T. 364.

(*m*) *Sykes v. Sykes*, (1897) P. 306; 66 L. J. P. 162; 77 L. T. 150; *Kettlewell v. Kettlewell*, (1898) P. 138; 67 L. J. P. 16; 77 L. T. 631. See also *Shorthouse v. Shorthouse* (1898), 78 L. T. 687; affirmed, 79 L. T. 366.

(*n*) (1861), 31 L. J. P. 33.

(*o*) *Stanley v. Stanley*, (1898) P. 227; 68 L. J. P. 7; 79 L. T. 104.

(*l*) *Prescott v. Prescott* (1868),

Alimony and maintenance, permanent.

—
sum to be paid to wife absolutely.

Order by consent.

Partnership business, basis of calculation of husband's income out of.

Arrears of alimony.

Promise to release.

Wife entitled to separate

commenting on the last two cases—held, that the Court has no power under section 32 of the Matrimonial Causes Act, 1857, either to order a lump sum to be paid over to a wife absolutely for her permanent maintenance, or to order such lump sum to be secured to her or to the issue of the marriage by settlement, for a longer period than her own life (*p*).

But the Court may make any order it please with the consent of all parties, as where the respondent having been ordered to secure to the wife 721*l.* per annum during their joint lives, it varied the order on the application of the wife, the respondent not opposing, by ordering him to pay 6,000*l.* direct to her (*q*).

The proper basis of calculation of the sum to be secured for a wife's maintenance where the husband is in business is the amount he can draw out of his business without his partner's consent, and not his share of profits (*r*).

Where a wife has obtained an order for an annual sum to be secured to her, she can release or alienate it (*s*); but a promise to release arrears and future payments of alimony is not supported by a consideration of a sum less than the arrears (*t*).

Where the husband's yearly income was 300*l.*, and the

(*p*) *Twentyman v. Twentyman*, (1903) P. 82; 72 L. J. P. 36; 88 L. T. 571; and see further, as to amounts in different cases, *Wilcocks v. Wilcocks* (1859), 32 L. J. P. 205; *Todd v. Todd* (1873), 42 L. J. P. 62; 29 L. T. 252; *Warren v. Warren* (1890), 63 L. T. 264; *Corbett v. Corbett* (1888), 14 P. D. 7; 58 L. J. P. 17; 60 L. T. 74; *George v. George* (1869), 38 L. J. P. 34; 20 L. T. 232.

(*q*) *Kirk v. Kirk*, (1902) P. 145; 71 L. J. P. 78; 87 L. T. 148.

(*r*) *Hanbury v. Hanbury*, (1894) P. 315; 63 L. J. P. 105; 70 L. T. 569; (1895) A. C. 417; 72 L. T. 480.

(*s*) *Maclurcan v. Maclurcan* (1897), 77 L. T. 474 (C. A.).

(*t*) *Underwood v. Underwood*, (1894) P. 204; 63 L. J. P. 109; 70 L. T. 390. See also *De Lossy v. De Lossy* (1890), 15 P. D. 115; 62 L. T. 704; but see, as to sums ordered under Mat. C. Act, 1866, s. 1, *Watkins v. Watkins*, (1896) P. 222; 65 L. J. P. 75; 74 L. T. 636.

wife had an income of 12*l.*, and was entitled in reversion on the death of a person aged eighty to an income of 70*l.*, the Court declined to order permanent maintenance (*u*). Alimony and maintenance, permanent.

When the Court makes an order for permanent maintenance after a marriage has been dissolved on the wife's petition, it is not now usual to insert the clause *dum sola et casta vixerit* into such order (*x*); and when this clause is inserted, this is usually done not in the order, but in the deed of security (*y*); and it has been held by the Court of Appeal that the *dum sola et casta* clause ought to be inserted or omitted upon the consideration of the facts of each case (*z*). estate, husband's income small.
Dum sola et casta clause.
Discretion of Court.

Where upon a decree absolute being obtained by a wife an order is made for a fixed sum for her maintenance and there is no *dum sola et casta* clause, the Court cannot vary the order on the application of the husband alleging that the wife has been guilty of adultery. The *dum sola et casta* clause must be inserted in the order; it will not be inferred (*a*).

The grounds for variation or modification are set out in section 1 of the Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), and there is no power given to vary

(*u*) *Rawlins v. Rawlins* (1865), 34 L. J. P. 147; 4 S. & T. 158; 13 L. T. 212.

(*x*) *Harrison v. Harrison* (1886), 12 P. D. 130; 56 L. J. P. 76; 57 L. T. 119. See also *Gladstone v. Gladstone* (1876), 1 P. D. 444; 45 L. J. P. 82; 35 L. T. 380; *Bradley v. Bradley* (1882), 7 P. D. 237; 51 L. J. P. 87; 47 L. T. 355; *Lister v. Lister* (1890), 15 P. D. 4; 62 L. T. 90. See as to the husband's liability at common law under a covenant in a separation deed to pay an annuity to his wife after

she has committed adultery, the *dum casta* clause not having been inserted in such deed, *Fearon v. Aylesford* (1884), 14 Q. B. D. 792; 54 L. J., Q. B. D. 33; 52 L. T. 954.

(*y*) *Medley v. Medley* (1882), 7 P. D. 122; 51 L. J. P. 74.

(*z*) *Wood v. Wood*, (1891) P. 272; 60 L. J. P. 66; 64 L. T. 586; *Kettlewell v. Kettlewell*, (1898) P. 138; 67 L. J. P. 16; 77 L. T. 631.

(*a*) *Collins v. Collins* (1910), 103 L. T. R. 80.

Alimony and maintenance, permanent.

an order made upon such grounds as the alleged adultery on the part of the wife.

After a decree of nullity, as well as after a decree of dissolution of marriage, the conduct of the parties is one of the material matters to be taken into consideration in dealing with any application for an allowance; and the discretion of Court in ordering or refusing an allowance must be exercised according to the circumstances of each particular case (b).

1902. In 1902, it was decided by the Court of Appeal, that the Court, under section 32 of the Matrimonial Causes Act, 1857, has an absolute discretion to order a husband to provide for a guilty wife, if it should be of opinion that the circumstances of the case warrant it in so doing (c).

Judicial separation on ground of wife's cruelty. As a rule a judicial separation on the ground of the wife's cruelty will not now be decreed, except on the condition that the husband makes some reasonable provision for her maintenance (d).

1904. Where a husband obtained a divorce from his wife on the ground of her adultery, she having previously obtained a decree of judicial separation from him on the ground of

(b) *Dunbar (otherwise White) v. Dunbar*, (1909) P. 90; 78 L. J. P. 35; 100 L. T. 380.

(c) *Ashcroft v. Ashcroft and Roberts*, (1902) P. 270; 71 L. J. P. 125; 87 L. T. 229. See further as to allowance to guilty wife, *Keats v. Keats and Montezuma* (1859), 1 S. & T. 334; 28 L. J. P. 57; *Ratcliffe v. Ratcliffe and Anderson* (1859), 1 S. & T. 467; 29 L. J. P. 171; *Winstone v. Winstone and Dyne* (1861), 2 S. & T. 246; 30 L. J. P. 109; 3 L. T. 895; *Bent v. Bent and Footman* (1861), 2 S. & T. 392; 30 L. J. P. 175; *Latham v. Latham and Gethin* (1861), 30 L. J. P. 43; *Robertson v.*

Robertson and Favagrossa (1883), 8 P. D. 94; 48 L. T. 590; *Clifford v. Clifford* (1884), 9 P. D. 76; 53 L. J. P. 68; 50 L. T. 650; *Weller v. Weller* (1890), 63 L. T. 263; *Lander v. Lander*, (1891) P. 161; 60 L. J. P. 65; 64 L. T. 120; *Edwards v. Edwards and Francis*, (1894) P. 33; 63 L. J. P. 62; 70 L. T. 39; *Parry v. Parry*, (1896) P. 37; 65 L. J. P. 35; *A's Divorce Bill* (1887), 12 A. C. 364.

(d) *Forth v. Forth* (1867), 36 L. J. P. 122; 16 L. T. 574. See also *Pickard v. Pickard* (1864), 33 L. J. P. 158, and *nom. Prichard v. Prichard* (1864), 3 S. & T. 523; 10 L. T. 789.

his cruelty, the Court ordered that the decree should not be made absolute until he had secured to the wife the sum of 52*l.* a year, *dum sola et casta vixerit* (e); and in the course of the case the principles on which the *dum sola et casta* clause is ordered to be inserted were thoroughly discussed.

The words *dum sola vixerit* may be inserted in a deed securing permanent maintenance to a wife, without the words *et casta* (f).

The order may be made for payment of the alimony to the wife's solicitor for the sake of convenience, but this can only be done on the written application of the wife herself, nor will the solicitor be entitled to charge for so receiving it (g).

The Court will grant an injunction to prevent a husband from making away with his property, or putting it out of his power, so as to avoid payment of alimony (h); but it has no power to do so until some order has been made for alimony, or in some way for the payment of money (i).

Where orders had been made on the respondent in a divorce suit to pay and secure 61*l.* for his wife's costs, the Court granted an injunction to restrain him from receiving a legacy to which he was entitled until he had complied with the order; but refused to make any order to enforce an allowance which had been granted the wife in proceedings for judicial separation before a magistrate (k).

Alimony and maintenance, permanent.

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previously judicially separated from wife on ground on his cruelty.

Dum sola without the words *et casta*.

Order to pay to solicitor.

Injunction to restrain husband from making away with property.

Injunction to restrain husband from receiving legacy,

(e) *Squire v. Squire and O'Callaghan*, (1905) P. 5; 74 L. J. P. 1.

(f) *Smith v. Smith*, (1898) P. 29; 67 L. J. P. 54; 78 L. T. 28.

(g) *Margetson v. Margetson* (1865), 35 L. J. P. 80. See also as to payment to wife's solicitor, *Parr v. Parr and White* (1860), 32 L. J. P. 90; *Ladmore v. Ladmore* (1863), 32 L. J. P. 157.

(h) See *Hawes v. Hawes* (1886), 57 L. T. 374; *Noakes v. Noakes and Hill* (1877), 4 P. D. 60; 47 L. J. P. 20; 37 L. T. 47; *Watts v. Watts* (1876), 24 W. R. 623. See also *Sidney v. Sidney* (1867), 17 L. T. 9.

(i) *Newton v. Newton* (1885), 11 P. D. 11; 55 L. J. P. 13.

(k) *Gillett v. Gillett* (1889), 14 P. D. 158; 58 L. J. P. 84; 61 L. T. 401.

Alimony and maintenance, permanent.

and from dealing with property.

Injunction refused in judicial separation.

When subsequent circumstances will afford ground for altering amount of permanent alimony.

Husband receiving increased salary.

Wife committing adultery after order for permanent alimony.

Wife receiving allowance from husband.

Where a husband was ordered to secure a lump sum of money for the permanent maintenance of his wife, the Court granted an injunction restraining the husband from dealing with certain of his property until such order had been complied with (*l*).

But the Court refused to grant an injunction where an order for alimony *pendente lite* had been made in a suit for judicial separation (*m*).

The Court refused to entertain an application to reduce permanent alimony granted eight years before, no evidence being before it of the circumstances of the husband at the time the order was made (*n*).

On the other hand, if the husband receives a larger salary by reason of the increased expenses of his position, the wife will not be entitled to the usual proportion of such income (*o*).

Where permanent alimony has been allotted to a wife on her obtaining a decree of judicial separation, and the husband afterwards obtains a decree *nisi* for dissolution of marriage on the ground of her adultery, the Court will not, before the decree has been made absolute, discharge the order for payment of alimony (*p*).

Where a petitioner has accepted an allowance from the respondent under a deed of separation, and subsequently obtains a dissolution of her marriage, or a judicial separation, she is not precluded from applying for an increased provision out of the income of the respondent (*q*).

(*l*) *Newton v. Newton*, (1896) P. 36; 65 L. J. P. 15.

(*m*) *Carter v. Carter*, (1896) P. 35; 65 L. J. P. 48. And see order made as to alimony in Parliament in an Irish case, *A.'s Divorce Bill* (1887), 12 A. C. 364.

(*n*) *Saunders v. Saunders* (1858), 1 S. & T. 72.

(*o*) *Louis v. Louis* (1866),

L. R., 1 P. & D. 230; 35 L. J. P. 92; 14 L. T. 770.

(*p*) *Stoate v. Stoate* (1861), 30 L. J. P. 180.

(*q*) See *Benyon v. Benyon and O'Callaghan* (1876), 1 P. D. 447; 45 L. J. P. 93; *Bishop v. Bishop*, (1897) P. 138; 66 L. J. P. 69; 76 L. T. 409; *Judkins v. Judkins*, (1897) P. 138; 66 L. J.

Both parties are, as a rule, bound by the amount at which the husband's income was estimated for the purpose of allotting alimony *pendente lite*, and, in the absence of proof that the husband's income has altered, permanent alimony will be awarded upon the income upon which alimony *pendente lite* was allotted (*r*).

Where by a post-nuptial deed it was covenanted that the wife should have an allowance of 100*l.* a year if her husband should afterwards be guilty of cruelty or adultery, the Court, notwithstanding such deed, gave the wife 200*l.* a year after she had obtained a decree dissolving her marriage (*s*).

Section 35 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), enables the Court to make provision for children the marriage of whose parents has been pronounced null and void. Therefore, where a decree *nisi* was made declaring a *de facto* marriage void on account of an irregularity in its solemnization, the Court ordered a provision for the child to be inserted in the final decree, and refused to make the decree absolute until materials were furnished for deciding what provision ought to be made (*t*).

It was held in *Blandford v. Blandford* (*u*) that the Court had no power to make an order for the maintenance of children above the age of sixteen years. This decision

Alimony and maintenance, permanent.

As a rule parties bound by estimated income for alimony *pendente lite*.

Covenant for fixed allowance in case husband guilty of cruelty or adultery.

Nullity suit, provision for child.

Mat. C. Act, 1857, s. 35.

Court may order provision for child to age of 21.

P. 76; 76 L. T. 409. See also *Morrall v. Morrall* (1881), 6 P. D. 98; 50 L. J. P. 62; 47 L. T. 50. And for a case where the Court refused to increase an allowance under the deed, see *Gandy v. Gandy* (1882), 7 P. D. 168; 51 L. J. P. 41; 46 L. T. 607; *Barry v. Barry*, (1901) P. 87; 70 L. J. P. 17; 84 L. T. 33.

(*r*) *Franks v. Franks* (1861), 31 L. J., P. & M. 25; *Bonsor v. Bonsor*, (1897) P. 77; 66 L. J.

P. 35; 76 L. T. 168. As to mode of showing that husband's income has diminished, see *Fisk v. Fisk* (1862), 31 L. J. P. 60; *Davies v. Davies* (1863), 32 L. J. P. 152.

(*s*) *Wilkinson v. Wilkinson* (1893), 69 L. T. 457.

(*t*) *Langworthy v. Langworthy* (1886), 11 P. D. 85; 55 L. J. P. 33; 54 L. T. 776.

(*u*) (1892) P. 148; 61 L. J. P. 97; 67 L. T. 392.

Alimony and maintenance, permanent.

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was, however, overruled by the Court of Appeal in *Thomasset v. Thomasset* (*x*), so that the Court now makes orders for maintenance of children up to the age of twenty-one years.

Agreement as to children between parents.

The statutory power of the Court as to maintenance and education of children is not affected by any previous agreement between the parents (*y*).

See further, Part II., Practice, tit. "Alimony and Maintenance" (p. 446). See also "Costs," *post*, Chap. XVI. (p. 228).

(*x*) (1894) P. 295; 63 L. J. P. 140; 71 L. T. 148.

(*y*) *Bishop v. Bishop*, (1897) P. 138; 66 L. J. P. 69; 76 L. T. 409.

CHAPTER X.

PROTECTION ORDERS.

By section 21 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), "A wife deserted by her husband may at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or, if resident in the country, to justices in petty sessions, or in either case to the Court, for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of, after such desertion, against her husband or his creditors, or any person claiming under him; and such magistrate or justices or court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him; and such earnings and property shall belong to the wife as if she were a *feme sole*: Provided always, that every such order, if made by a police magistrate or justices at petty sessions, shall, within ten days after the making thereof, be entered with the registrar of the county court within whose jurisdiction the wife is resident (a); and that it shall be lawful for the husband, and any creditor or other person claiming

Protection orders.

Wife deserted by her husband may apply to a police magistrate or justices in petty sessions for protection.

Mat. C. Act, 1857, s. 21.

Effect of, to make wife *feme sole*.

(a) This proviso is directory, and not imperative; and the will of a married woman who has obtained such an order is valid, although the order may not have

been registered within the time specified in the Act: *In the goods of Faraday* (1861), 2 S. & T. 369; 31 L. J. P. 7; 6 L. T. 57.

Protection orders.

Effect of, to make wife *feme sole*.

under him, to apply to the court or to the magistrate or justices by whom such order was made, for the discharge thereof: Provided also, that if the husband or any creditor of or other person claiming under the husband shall seize or continue to hold any property of the wife after notice of any such order, he shall be liable, at the suit of the wife (which she is hereby empowered to bring), to restore the specific property, and also for a sum equal to double the value of the property so seized or held after such notice as aforesaid: If any such order of protection be made, the wife shall during the continuance thereof be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation."

Wives deserted by their husbands may apply to the judge for an order to protect property, &c., acquired by them.

Mat. C. Act, 1858, s. 6.

By section 6 of the Matrimonial Causes Act, 1858 (21 & 22 Vict. c. 108), "Every wife deserted by her husband, wheresoever resident in England, may, at any time after such desertion, apply to the said Judge Ordinary for an order to protect any money or property in England she may have acquired or may acquire by her own lawful industry (*b*), and any property she may have become possessed of or may become possessed of after such desertion, against her husband and his creditors, and any person claiming under him; and the Judge Ordinary shall exercise in respect of every such application all the powers conferred upon the Court for Divorce and Matrimonial Causes under the twentieth and twenty-first Victoria, chapter eighty-five, section twenty-one" (*c*).

Provisions respecting property of

Section 7 of the same Act extends the operation of these orders ". . . to property to which such wife has

(*b*) Property acquired by keeping a brothel is not protected. See *Mason v. Mitchell* (1865), 3 H. & C. 528; 34 L. J., Ex. 68; 11 L. T. 714.

(*c*) The powers conferred by the earlier Act could only be

exercised by the full Court. The above enables them to be exercised by the Judge Ordinary, whose powers are now vested in the judges of the Probate, Divorce and Admiralty Division.

become or shall become entitled as executrix, administratrix, or trustee, since the sentence of separation or the commencement of the desertion (as the case may be); and the death of the testator or intestate shall be deemed to be the time when such wife became entitled as executrix or administratrix" (*d*).

By section 8, where a wife has ". . . obtained an order to protect her earnings or property, or a decree for judicial separation, such order or decree shall, until reversed or discharged, so far as necessary for the protection of any person or corporation who shall deal with the wife, be deemed valid and effectual; and no discharge, variation, or reversal of such order or decree shall prejudice or affect any rights or remedies which any person would have had in case the same had not been so reversed, varied, or discharged, in respect of any debts, contracts, or acts of the wife incurred, entered into, or done between the times of the making such order or decree and of the discharge, variation, or reversal thereof; and property of or to which the wife is possessed or entitled for an estate in remainder or reversion at the date of the desertion or decree (as the case may be) shall be deemed to be included in the protection given by the order or decree."

By section 9, "Every order . . . shall state the time at which the desertion in consequence whereof the order is made commenced; and the order shall, as regards all persons dealing with such wife in reliance thereon, be conclusive as to the time when such desertion commenced."

And by section 10, "All persons and corporations who shall, in reliance on any such order or decree as aforesaid, make any payment to, or permit any transfer or act to be made or done by, the wife who has obtained the same, shall notwithstanding such order or decree may then have been

Protection orders.

wife to extend to property vested in her as executrix, &c.

Mat. C. Act, 1858, s. 7.

Ibid. s. 8.

Order for protection of earnings, &c. of wife to be deemed valid :

for protection of persons dealing with wife.

Ibid. s. 9.

Order to state the time at which the desertion commenced.

Ibid. s. 10.

Indemnity to corporations, &c., making payments under orders afterwards reversed.

(*d*) See as to transfer of Bank of England (1858), 4 K. & J. of England stock, *Bathe v. Bank* 564; 27 L. J., Ch. 630.

Protection
orders.
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discharged, reversed or varied, or the separation of the wife from her husband may have ceased, or at some time since the making of the order or decree been discontinued, be protected and indemnified in the same way in all respects as if, at the time of such payment, transfer, or other act, such order or decree were valid and still subsisting without variation in full force and effect, and the separation of the wife from her husband had not ceased or been discontinued, unless at the time of such payment, transfer, or other act, such persons or corporations had notice of the discharge, reversal, or variation of such order or decree or of the cessation or discontinuance of such separation."

Mat. C. Act,
1864, s. 1.
Amending
provisions of
Mat. C. Act,
1857, s. 21.

By section 1 of 27 & 28 Vict. c. 44, an Act passed solely for the purpose of amending section 21 of the Matrimonial Causes Act, 1857, it is provided that "Where under the provisions of section twenty-one of the said Act a wife deserted by her husband shall have obtained or shall hereafter obtain an order protecting her earnings and property from a police magistrate, or justices in petty sessions, or the Court for Divorce and Matrimonial Causes, as the case may be, the husband, and any creditor or other person claiming under him, may apply to the Court or to the magistrate or justices by whom such order was made, for the discharge thereof, as by the said Act authorized; and in case the said order shall have been made by a police magistrate, and the said magistrate shall have died or been removed, or have become incapable of acting, then in every such case the husband or creditor, or such other person as aforesaid, may apply to the magistrate for the time being acting as the successor or in the place of the magistrate who made the order of protection, for the discharge of it, who shall have authority to make an order discharging the same; and an order for discharge of an order for protection may be applied for to and be granted by the Court, although the order for protection was not made by the Court, and an

order for protection made at one petty sessions may be discharged by the justices of any later petty sessions, or by the Court.”

Protection orders.

The Court must be satisfied that there has been actual desertion (*e*); the absence of a husband in his ordinary occupation of a mariner does not constitute “desertion” within the meaning of the statute (*f*).

What is desertion.

An application to discharge a protection order is not limited to the life of a married woman; therefore the Court allowed a claim to pronounce against the validity of the will of a married woman who had obtained a protection order and a counter-claim to discharge the protection order to be included in the same action (*g*).

Application to discharge, not limited to life of married woman.

In *Mahoney v. McCarthy* (*h*) a protection order was set aside at the instance of the husband, after the death of the wife, it having been obtained without notice to the husband and by a false and fraudulent allegation of desertion and concealment of material facts.

Protection order set aside after death of wife.

These orders have a retrospective effect, extending back to the commencement of the desertion, so that the will of a married woman made after the desertion has commenced, but before the order was obtained, is valid (*i*). And a married woman with an order of protection may bring an action of tort in her own name (*k*).

Orders have retrospective effect.

Action by wife having protection order.

(*e*) *Ex parte Sewell* (1858), 28 L. J. P. 8.

(*f*) *Ex parte Aldridge* (1858), 1 S. & T. 88. As to what does constitute desertion, see *ante*, Chap. III., also *Cargill v. Cargill* (1858), 1 S. & T. 235; *Ewart v. Chubb* (1875), L. R., 20 Eq. 454; 45 L. J., Ch. 108; *Thompson v. Thompson* (1858), 1 S. & T. 231; 27 L. J. P. 65.

(*g*) *Mudge v. Adams* (1881), 6 P. D. 54; 50 L. J. P. 49; 44 L. T. 185.

(*h*) (1892) P. 21; 61 L. J. P. 41.

(*i*) *In the goods of Elliott* (1871), L. R., 2 P. & D. 274; 40 L. J. P. 76; 25 L. T. 203.

(*k*) *Ramsden v. Brearley* (1875), L. R., 10 Q. B. 147; 44 L. J., Q. B. 46; 32 L. T. 24. See further as to actions by married women having protection orders, *Thomas v. Head* (1860), 2 F. & F. 88; *Midland Railway Co. v. Pye* (1861), 30 L. J., C. P. 314; 10 C. B., N. S. 179; 4 L. T. 510.

Protection orders.

Wife having order dying intestate.

Order should be general in terms, so as to include all property.

Woman having obtained protection order *feme sole*.

Legacy.

Right to alimony *pendente lite* after protection order.

Where a married woman who had obtained a protection order died intestate in the life of her husband, the Court granted letters of administration for the use and benefit of the children to their duly elected guardian (*l*).

The order should in terms be for the protection of the whole of the wife's property (*m*); and even although a protection order was in terms limited to the wife's earnings and the property coming to her as executrix, administratrix, or trustee, it was held that a reversionary interest of the wife which had fallen into possession since the date of her desertion was, though in terms excluded, included in the terms of the order (*n*). The Court of Appeal, however, has since held that a protection order obtained by a married woman for desertion only constitutes her a *feme sole* in respect of her earnings and property acquired after desertion; it has no effect on property acquired before desertion (*o*).

A wife who has obtained a protection order is entitled to payment of a fund in Court representing a legacy bequeathed to her (*p*).

By obtaining a protection order a wife does not deprive herself of her right to alimony *pendente lite* in a subsequent matrimonial suit (*q*).

See further, Part II., Practice, tit. "Protection Orders" (p. 476).

(*l*) *In the goods of Weir* (1862), 2 S. & T. 451; 31 L. J. P. 88; 6 L. T. 131. See also *In the goods of Worman* (1859), 1 S. & T. 513; 29 L. J. P. 164.

(*m*) *Ex parte Mullineux* (1858), 1 S. & T. 77; 27 L. J. P. 19.

(*n*) *Re Whittingham's Trust* (1864), 10 Jur., N. S. 818; 10 L. T. 368.

(*o*) *Hill v. Cooper*, (1893) 2 Q. B. 85; 62 L. J., Q. B. 423; 69 L. T. 216. See also *Hughes, In re, Brandon v. Hughes*, (1898)

1 Ch. 529; 67 L. J., Ch. 279; 78 L. T. 432.

(*p*) *In re Kingsley* (1858), 26 Beav. 84; 28 L. J., Ch. 80. See further as to property acquired by a wife who has obtained a protection order, *Cooke v. Fuller*, Ib. 99; *Nicholson v. Drury Building Co.* (1877), 7 Ch. D. 48; 47 L. J., Ch. 192; 37 L. T. 459; *In re Coward* (1875), 20 L. R., Eq. 179; 44 L. J., Ch. 384; 32 L. T. 682.

(*q*) *Hakewill v. Hakewill* (1860), 30 L. J. P. 254.

CHAPTER XI.

VARIATION OF SETTLEMENTS (a).

By section 45 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), "In any case in which the Court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made to appear to the Court that the wife is entitled to any property either in possession or reversion, it shall be lawful for the Court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property or any part thereof, for the benefit of the innocent party and of the children of the marriage or either or any of them."

And by section 6 of the Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), " . . . any instrument executed pursuant to any order of the Court made under the said enactment before or after the passing of this Act, at the time of or after the pronouncing of a final decree of divorce or judicial separation, shall be deemed valid and effectual in the law, notwithstanding the existence of the disability of coverture at the time of the execution thereof."

The powers conferred on the Court by section 45 of the Act of 1857 were extended by section 5 of the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), which enacts that "The Court after a final decree of nullity of marriage or

Settlements, powers of the Probate, Divorce and Admiralty Division with respect to. Court may order settlement of property for benefit of innocent party and children of marriage. Mat. C. Act, 1857, s. 45; amended by Mat. C. Act, 1860, s. 6.

As to marriage settlements of parties after final decree of nullity of marriage.

(a) As to petitions or applications for a settlement or allowance after a decree for restitution of conjugal rights under sect. 3

of the Mat. C. Act, 1884 (47 & 48 Vict. c. 68), see *ante*, Chap. IV. (p. 83).

Settlements.

Mat. C. Act,
1859, s. 5.

May inquire
into any
settlement
and make
orders for
benefit of
parents or
children.

The same
where no
children.

Applicable to
living persons
only.

1900.

Post-nuptial
settlement,
what is?

1900.

Mat. C. Act,
1859, s. 5,
and Mat. C.
Act, 1878,
s. 3, apply
equally to all
cases of
nullity.

dissolution of marriage may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage or of their respective parents, as to the Court shall seem fit."

And by section 3 of the Matrimonial Causes Act, 1878 (41 Vict. c. 19), the Court can exercise the powers vested in it by this section, notwithstanding that there are no children of the marriage.

These sections are applicable to living persons only. The Court has no power under them to order an executor of a deceased husband to be made a party, for the purpose of continuing proceedings to vary a settlement, where there are no children, and the variation is not for the benefit of the wife (*b*).

The question whether a deed is a separation deed or a post-nuptial settlement, depends on the intention of the parties to be gathered from the terms of the deed (*c*).

An assignment, made after marriage, of leasehold property and furniture by a husband in favour of his wife absolutely is not a post-nuptial settlement within the meaning of the section (*d*).

The powers of the Court as to settlements under section 5 of the Matrimonial Causes Act, 1859, and section 3 of the Matrimonial Causes Act, 1878, extend to all cases of nullity, including those where the decree has been pronounced on the ground of the respondent's impotence (*e*).

(*b*) *Thomson v. Thomson and Rodschinka*, (1896) P. 263; 65 L. J. P. 80; 74 L. T. 801.

(*c*) *Rowell v. Rowell*, (1900) 1 Q. B. 9; 69 L. J., Q. B. 55; 81 L. T. 429.

(*d*) *Hubbard (otherwise Rogers) v. Hubbard*, (1901) P.

157; 70 L. J. P. 34; 84 L. T. 441.

(*e*) *Dormer (otherwise Ward) v. Ward*, (1901) P. 20; 69 L. J. P. 144; 83 L. T. 556. See *Sharpe (otherwise Morgan) v. Sharpe*, (1909) P. 20; 78 L. J. P. 21; 99 L. T. 884.

So where a marriage was declared null and void on the ground of the husband's impotence, the Court re-transferred all the property brought into settlement by the wife to her absolutely freed from all the trusts of the settlement (f). Settlements.
Nullity on ground of impotence.

The Court has power under these sections to make an order dealing with property settled for the benefit of a petitioner, even though it may affect property which, under the settlement, has vested in the children of the marriage (g), or to override the restraint upon anticipation clause (h). Property already vested in children of marriage.

In exercising its discretion the Court ought to consider the effect of its order as a whole. Therefore, although it has always been the practice to consider first the interests of the children, there may be cases in which the Court will deprive even infant children of part of their interest under a settlement (i). Interests of infant children.

The power conferred upon the Court by this section must be exercised once for all. An order made under it is not liable to be varied by reason of circumstances arising after the date of the order (k); though such an order, made by consent of all the parties, may be amended in the interests of infant children of the marriage (l). Power under this section must be exercised once for all.

(f) *A. (otherwise M.) v. M.* (1884), 10 P. D. 178; 54 L. J. P. 31. See also *Leeds v. Leeds* (1886), 57 L. T. 373. And see further as to variation of settlements in nullity suits, *H. (otherwise G.) v. G.* (1900), 69 L. J. P. 120; *B. (otherwise H.) v. B.*, (1901) P. 39; 70 L. J. P. 4; *E. v. E.* (1902), 87 L. T. 149; *Attwood (otherwise Pomeroy) v. Attwood*, (1903) P. 7; 71 L. J. P. 129; 87 L. T. 750.

(g) *Blood v. Blood*, (1902) P. 190; 71 L. J. P. 97; 86 L. T. 641.

(h) *Churchward v. Churchward*, (1910) P. 195; 79 L. J. P. 59; 102 L. T. 862.

(i) *Whitton v. Whitton*, (1901) P. 348; 71 L. J. P. 10; 85 L. T. 646. See also *Hodgson Roberts v. Hodgson Roberts and Whitaker*, (1906) P. 142; 75 L. J. P. 48; 94 L. T. 621.

(k) *Benyon v. Benyon and O'Callaghan* (1890), 15 P. D. 29, 54; 59 L. J. P. 39; 62 L. T. 329, 381.

(l) *Arkwright v. Arkwright* (1895), 73 L. T. 287.

Settlements.

Scotch settlement within Act. But Court cannot vary settlement after foreign divorce. Absolute assignment by wife to husband of freehold property not a settlement. Limitation of powers under Mat. C. Act, 1857, s. 45. Court cannot vary guilty wife's power of appointment under Mat. C. Act, 1857, s. 45. Secus under Mat. C. Act, 1859, s. 5. Power to relieve innocent party from covenant to appoint in favour of guilty. Separation deeds.

The Court has power under these sections to vary a Scotch settlement (*m*), even although both parties were domiciled in Scotland at the time of the marriage (*n*).

But the powers under them can only be exercised where the Court itself has pronounced the decree; it cannot be exercised after a colonial or foreign divorce (*o*).

An absolute assignment by a wife to her husband during the marriage of freehold property is not "a settlement" within the meaning of these sections (*p*).

Under section 45 of the Matrimonial Causes Act, 1857, the Court has no power to alter a settlement made on the marriage of the parties (*q*); and it has been held that an interest under a marriage settlement which may never be realized is not property in "*reversion*" under this section (*r*).

But the Court may order the trustees of a guilty wife to pay over a moiety of her income to trustees named by the petitioner (*s*).

But in cases coming within the scope of section 5 of 22 & 23 Vict. c. 61, the Court has power to vary every part of and every covenant in a marriage settlement, including powers of appointment (*t*).

Ordinary separation deeds, and all other deeds whereby property is settled upon or is paid or secured in any way

(*m*) *Nunneley v. Nunneley and Marrian* (1890), 15 P. D. 186; 63 L. T. 113.

(*n*) *Forsyth v. Forsyth*, (1891) P. 363; 61 L. J. P. 13; 65 L. T. 556.

(*o*) *Moore (falsely called Bull) v. Bull*, (1891) P. 279; 60 L. J. P. 76.

(*p*) *Chalmers v. Chalmers* (1892), 1 R. 504; 68 L. T. 28.

(*q*) *Norris v. Norris and Gyles* (1858), 1 S. & T. 174; 27 L. J. P. 72. See also *Gandy v. Gandy*

(1882), 7 P. D. 168; 51 L. J. P. 41; 46 L. T. 607.

(*r*) *Stone v. Stone and Brownrigg* (1864), 3 S. & T. 372; 33 L. J. P. 95; 10 L. T. 140. See also *Milne v. Milne and Fowler* (1871), L. R., 2 P. & D. 295; 40 L. J. P. 67; 25 L. T. 274.

(*s*) *Seatel v. Seatel* (1860), 4 S. & T. 230; 30 L. J. P. 216.

(*t*) *Benyon v. Benyon and O'Callaghan* (1876), 1 P. D. 447; 45 L. J. P. 96. See also *Evered v. Evered and Graham* (1874), 43 L. J. P. 86; 31 L. T. 101.

to a woman in her character of wife, come within the scope of this section (*u*). Settlements.

The Court has power to vary a post-nuptial settlement contained in a deed of separation (*x*). Post-nuptial settlement.

In *Hope v. Hope and Erdody* (*y*), Sir James Hannen, P., refused to vary a settlement by depriving the guilty wife of her right to join in the appointment of fresh trustees, and expressed great doubt whether he had the power to vary a settlement in that manner. Power of appointing new trustees.

But the Court has power to extinguish a joint power of appointment of new trustees (*z*). Joint power.

The Court has no authority to alter the destination of dividends due and payable before the date of its order (*a*); neither has it power to vary a marriage settlement, so as to deprive an infant child of the marriage of its interest, even though it would be for the advantage of the infant (*b*). Dividends due before date of order.
Interest of infant child.

In varying a marriage settlement, the Court will not *Dum casta* clause.

(*u*) *Worsley v. Worsley and Wignell* (1869), L. R., 1 P. & D. 648; 38 L. J. P. 43; 20 L. T. 546. But see *Chalmers v. Chalmers* (1892), 68 L. T. 28.

(*x*) *Jump v. Jump* (1883), 8 P. D. 159; 52 L. J. P. 71. See also *Clifford v. Clifford* (1884), 9 P. D. 76; 53 L. J. P. 68; 50 L. T. 650.

(*y*) (1874), L. R., 3 P. & D. 226; 44 L. J. P. 31; 31 L. T. 592. See also *Davies v. Davies and McCarthy* (1868), 37 L. J. P. 17.

(*z*) *Oppenheim v. Oppenheim and Ricotti* (1884), 9 P. D. 60; 53 L. J. P. 48; but in this case the respondent did not appear in the suit. See *Bosville v. Bosville*

and *Craven* (1888), 13 P. D. 76; 57 L. J. P. 62; 58 L. T. 640; *Noel v. Noel* (1885), 10 P. D. 179; 54 L. J. P. 73.

(*a*) *St. Paul v. St. Paul and Farquhar* (the Queen's Proctor intervening) (1869), L. R., 2 P. & D. 93; 39 L. J. P. 50; 23 L. T. 196.

(*b*) *Crisp v. Crisp* (1872), L. R., 2 P. & D. 426; 42 L. J. P. 13; 27 L. T. 428. On reference to the report of this case it will be evident that if it had been heard since the passing of the Judicature Acts the Court would have had power to make the particular order which had been agreed upon between the parties had it chosen to do so.

Settlements. impose the *dum sola et casta* clause on a wife who is the successful party in the suit (c).

Injunction. Where a husband petitioner, who had obtained a decree
 Restraining wife from dealing with property. *nisi* for dissolution, had given his solicitor instructions to file, at the proper time, a petition for variation of a settlement; the Court, on being satisfied that the wife was about to sell a house, which she claimed under such settlement, granted an injunction restraining her from doing so, and ordering her, in the event of the house being sold, to bring the proceeds of the sale into the registry (d).

Property and conduct of parties considered. In making orders to vary marriage settlements, the Court will take into consideration the conduct of both parties as well as their pecuniary position (e), and do its best to vary the settlement in such a way that the innocent party may suffer as little as possible from the act of the guilty party (f).

Guiding principle of cases. The guiding principle of the cases is, that where the breaking up of the home is due to the conduct of the respondent, the Court ought to place the petitioner and the children, as nearly as possible, in the same position as if the family life had not been interrupted (g).

(c) *Gladstone v. Gladstone* (1876), 1 P. D. 444; 45 L. J. P. 82; 35 L. T. 380.

(d) *Noakes v. Noakes and Hill* (1877), 4 P. D. 60; 47 L. J. P. 20; 37 L. T. 47. See also *Watts v. Watts* (1876), 24 W. R. 623.

(e) See *Chetwynd v. Chetwynd* (1865), L. R., 1 P. & D. 39; 35 L. J. P. 21; 13 L. T. 474. See also *Thompson v. Thompson* (where it was held that where a wife had committed adultery the Court would under no circumstances extinguish all the husband's interest in her property), 2 S. & T. 649; 32 L. J. P. 39; 7 L. T. 396; but see also *Constantinidi v. Constantinidi and*

Lance, (1905) P. 253; 74 L. J. P. 122; 93 L. T. 651 (where the husband having also committed adultery the Court refused to vary wife's settlement in his favour).

(f) *March v. March and Palumbo* (1867), L. R., 1 P. & D. 440; 36 L. J. P. 28; 15 L. T. 363. See also 36 L. J. P. 65; 16 L. T. 366.

(g) *Hartopp v. Hartopp and Akhurst*, (1899) P. 65; 68 L. J. P. 33; 80 L. T. 297. See also *Savary v. Savary* (1898), 79 L. T. 907. See also *Lorriman v. Lorriman and Clair*, (1908) P. 282; 77 L. J. P. 108; 99 L. T. 314.

In the following cases the wife had been found guilty of adultery:—

Settlements.

Where a wife was entitled to settled property amounting to 1,458*l.* per annum, and the husband brought nothing into settlement, his only income being 260*l.* a year from an official appointment, the Court, estimating the joint income of the husband and wife at 1,718*l.*, ordered, during the joint lives—(1) 200*l.* per annum to be paid to the husband for the maintenance of the child during minority, and after he attained full age to the child; (2) 440*l.* per annum to the husband for his own use (*h*).

Examples of variations of settlements by Court where wife guilty of adultery.

In ordering a settlement under section 45 of the Matrimonial Causes Act, the Court may take account of property to which a guilty wife is entitled in reversion (*i*).

Mat. C. Act, 1857 (20 & 21 Vict. c. 85), s. 45.

Where a petitioner's father had covenanted to pay the respondent, after the petitioner's death, an annuity of 100*l.* during the joint lives, an order was made that after the petitioner's death the annuity should be applied for the benefit of the only child of the marriage; but the Court held that it had no power to deprive the respondent of the annuity in the event of her surviving the child (*k*).

Property in reversion. Guilty wife. Annuity paid by wife's father.

The Court will not vary a marriage settlement merely for the purpose of compelling a respondent to restore a child to the custody of the petitioner (*l*).

Court will not vary for sole purpose of compelling respondent to restore a child. Wife's interest extinguished.

Where the only property brought into settlement was 150*l.* settled by the wife's father on his daughter for life, then on her husband for life, and after the death of the survivor to the children of the marriage. The Court extinguished the wife's life interest, and ordered the whole income of the settled property to be applied, during

(*h*) *March v. March* (see L. J. P. 52; 23 L. T. 239. See previous page). also *Pocock v. Pocock* (1868), 18

(*i*) *Savary v. Savary* (see L. T. 338.

(*k*) *Sykes v. Sykes and Smith* (1870), L. R., 2 P. & D. 163; 39

(*l*) *Symonds v. Symonds and Harrison* (1872), L. R., 2 P. & D. 447.

Settlements. the joint lives, for the benefit of the children, leaving the
Guilty wife. husband's life interest unaffected (*m*).

Order to By a post-nuptial settlement certain property had been
trustees to settled on the wife respondent, and by a subsequent deed
dispose of of separation the husband had covenanted to pay her an
income as annuity for life. After the marriage had been dissolved
though wife the Court ordered that whenever any money should be
dead. payable to her under the deed of separation the trustees
should, out of the moneys payable to her under the post-
nuptial settlement, pay and apply a sum equal in amount
upon such trusts as would be applicable thereto in case the
respondent had died in the lifetime of the petitioner (*n*).

Wife's Property was brought into settlement by both husband
interest in and wife, with a joint power of appointment in favour of
property the children of the marriage, with a further power of
brought into appointment to the wife, over so much of the property as
settlement by she had herself brought into settlement, in favour of any
husband future husband or children. The Court varied the settle-
extinguished. ments by absolutely extinguishing the guilty wife's inte-
rest in the property brought into settlement by the
husband, and further ordered that one-half of her pro-
perty should be paid to the husband and children, and
also that one-half of the wife's reversionary interest
should, upon its falling into possession, be assigned to
them. The Court also extinguished the wife's power of
Power of appointment under the joint power, and restricted the
appointment wife's power of appointment over her own property, to
varied. any husband married after the death of the petitioner,
and to the children of such marriage (*o*).

Proportion of Where a wife's income under the settlement amounted
wife's income to 1,050*l.* a year, and the husband possessed an income of
ordered to be paid to husband.

(*m*) *St. Paul v. St. Paul and Strong* (1872), L. R., 2 P. &
Farquhar (the Queen's Proctor D. 389; 41 L. J. P. 83; 27
intervening) (1869), L. R., 2 P. L. T. 247.
& D. 93; 39 L. J. P. 50; 23 (*o*) *Noel v. Noel* (1885), 10
L. T. 196. P. D. 179; 54 L. J. P. 73.
(*n*) *Bullock v. Bullock and*

about 600*l.* a year, part of which arose from money received from her, and there were no children of the marriage: the Court ordered the trustees to pay the husband 300*l.* a year during the joint lives (*p*). Settlements.
Guilty wife.

By a post-nuptial settlement a husband assigned certain property to trustees on trust to pay him the income during his life, or until he had incurred a forfeiture, and on a determination of his interest to his wife for her life, with further discretionary trusts for the benefit of the husband's next of kin, or for the benefit of a second wife, or the issue of a second marriage. The husband became bankrupt, and by a compromise sanctioned by the Chancery Division a portion of the fund was assigned to his trustee in bankruptcy, and his interest in the remainder was assigned to the trustees of the settlement. On a petition for variation, the Court refused to sanction a division of the fund proposed by the registrar, but ordered that the income of five-twelfths of it should be paid to the wife, and that in all other respects the trusts of the settlement should remain in force (*q*). Five-twelfths
of income
ordered to be
paid to wife.

Where there was no marriage settlement, but the husband had at the time of the marriage received a sum of 1,673*l.*, the property of the wife: the Court ordered that he should settle 1,000*l.* upon trust, that the interest should be applied for the benefit of the wife *dum sola et casta vixerit*, and that, upon her interest ceasing, the fund should be held upon trust for the children in equal shares, and that 1,000*l.* damages awarded against the co-respondent should be paid to the husband in lieu of the sum he would have to settle, and that the decree should be suspended until the settlement should be made (*r*). No settle-
ment.
Husband
received
1,673*l.* on
marriage.

(*p*) *Farrington v. Farrington and Schooles* (1886), 11 P. D. 84; 55 L. J. P. 69.

P. 51; 57 L. T. 375.

(*q*) *Smith v. Smith and Graves* (1887), 12 P. D. 102; 56 L. J.

(*r*) *Bent v. Bent and Footman* (1861), 2 S. & T. 392; 30 L. J. P. 175; 5 L. T. 139.

Settlements.
Guilty wife.
1904.

Variation
where legi-
timacy of
child
disputed.

In order that the Court may properly exercise its powers of variation under section 5 of the Matrimonial Causes Act, 1859, and section 3 of the Matrimonial Causes Act, 1878, it is necessary to ascertain what legitimate children (if any) of the parties are living at the time of the filing of the petition to vary. For this purpose the trial of an issue will, if necessary, be directed, the proceedings to vary being meanwhile stayed. Although the result of such issue may be to disturb the legitimacy of a child, the Probate Division will not, by refusing to deal with the matter, compel the parties to resort to the Chancery Division for an order directing the application of the trust funds (*s*).

Husband
receiving
allowance
from wife.

Where a husband has accepted an allowance from his wife under a deed of separation, and subsequently obtains a divorce, he is not precluded from applying for an increased provision out of his wife's income (*t*).

Petitioner
dying after
decree abso-
lute, having
exercised
certain
powers of
appointment
under settle-
ment.

Where a husband, who died after obtaining a divorce, had by his will excluded some of his children from participation in certain property, over which he had a power of appointment under his marriage settlement: but, at the same time, had secured to them a reasonable maintenance out of his general estate: the Court, whilst it extinguished his wife's life interest in his property, refused to compel her out of her separate estate, which was not large, to increase the portions of such children (*u*).

Property
brought into
settlement by
respondent.

A husband obtained a divorce. There were two settlements which substantially gave the wife a first life interest in half the income of the fund brought into settlement by herself, besides conditional benefits in certain contin-

(*s*) *Evans v. Evans and Blyth*,
(1904) P. 274; 73 L. J. P. 87;
91 L. T. 356; 20 T. L. R. 516;
Pryor v. Pryor and Shelford
(1887), 12 P. D. 165; 56 L. J.
P. 77; 57 L. T. 533; and *Douglas*
v. Douglas and Trevor (1898), 78

L. T. 88, discussed.

(*t*) *Benyon v. Benyon and*
O'Callaghan (1876), 1 P. D. 447;
45 L. J. P. 93.

(*u*) *Smithe v. Smithe and*
Roupell (1868), L. R., 1 P. &
D. 587.

gencies, the principal one being that upon the death of her mother, now aged about seventy, her income would be immediately increased from about 300*l.* to 650*l.* a year. There was also a power of appointing new trustees by the husband and wife during their joint lives, and by the survivor of them during his or her life. The registrar recommended, as to the property brought into settlement by the husband, that the whole of the wife's interest and powers should be extinguished; and as to the property brought into settlement by the respondent, that the settlement should be varied by ordering the trustees to pay 50*l.* a year to the husband for the maintenance and education of the infant child of the marriage during her minority, and afterwards to the said child; and that after the death of the wife's mother the allowance to the child should be increased to 150*l.* a year; and that the wife's power of appointment amongst the children or remoter issue of the marriage should be extinguished. It was left to the Court to say whether her power of appointing or joining in the appointment of new trustees should be extinguished. The registrar refused to take into account the great probability of the husband, who was a civil servant, obtaining certain promotion, which would give him an increase of income about equal to that which would accrue to the wife on the death of her mother. The Court held that the registrar was right in taking no account of the husband's probable promotion, but that, as the wife's increase of income was already a vested interest, the proposal to increase the allowance to the child was just and reasonable, but refused to extinguish her rights as to the appointment of new trustees (x).

Settlements.
Guilty wife.

Increase on
death of
mother.

Allowance to
child
increased in
proportion.

A husband who had obtained a divorce petitioned that certain jewellery belonging to his wife might be sold, and a settlement made of the proceeds, giving her a life interest in the income arising therefrom, with remainder to

Court refused
to order
wife's jewel-
lery to be sold.

(x) *Tupper v. Tupper and Terrell* (1890), 62 L. T. 665.

Settlements. himself. His income was substantial, that of his wife
 Guilty wife. only 72*l.* a year. The Court refused to order any settle-
 ment (*y*).

Court refused to make allowance variable so as to meet altered circumstances of husband. On a husband's petition for settlement of property to which the guilty wife was entitled, the Court refused to make the allowance variable to meet a possible fall in the income, or to limit the husband's receipt of this allowance to such time as he should be unmarried, or to limit the allowance to children to such time as they should be under sixteen years of age (*z*).

Dum casta clause. A husband and wife separated under a deed by which he agreed to allow her 200*l.* a year without any *dum casta* clause. Subsequently he obtained a divorce from her, and on his petition to vary this deed, the Court ordered the allowance to be reduced to 100*l.* a year, to be payable to the wife only *dum sola et casta vixerit* (*a*).

Property re-conveyed to husband absolutely. Where a marriage had been dissolved (there being no issue), and the rights of children of a future marriage were the sole limitation to the husband's absolute right to the settled property: the Court ordered the trustees to reconvey the property to the husband for his own use (*b*).

Re-settlement. Where a guilty wife, who had a power of re-settlement after her husband's death, had married the co-respondent, the Court so varied her settlement as to prevent re-settlement on any husband married or children born during her first husband's lifetime (*c*); and where a guilty wife lost an annuity in consequence of the divorce, the Court held this was a detriment to the children of

Annuity to wife lost. Compensation to children.

(*y*) *Schofield v. Schofield and Cowper* (1891), 64 L. T. 838.

(*z*) *Midwinter v. Midwinter*, (1893) P. 93; 62 L. J. P. 77; 68 L. T. 262.

(*a*) *Saunders v. Saunders and Beck* (1893), 69 L. T. 498.

(*b*) *Meredyth v. Meredyth and Leigh*, (1895) P. 92; 64 L. J. P. 54; 72 L. T. 898. See also *Mor-*

rissey v. Morrissey, (1905) P. 90; 74 L. J. P. 11; 92 L. T. 476; *Wynne v. Wynne* (1898), 78 L. T. 796; *Merton v. Merton* (1900), 83 L. T. 223; but see *Walpole v. Walpole and Goddard*, (1901) P. 196; 70 L. J. P. 49; 84 L. T. 727.

(*c*) *Day v. Day* (1898), 78 L. T. 358.

the marriage, and compensated them out of her settled property (*d*).

Money secured to be paid to a wife by the terms of a policy, if she is living at the time of her husband's death, may be "property in reversion," though the policy itself may not be a marriage settlement; and the Court can order a guilty wife to settle her interest under such policy on her husband and children (*e*).

In the following cases the husband had been found guilty of adultery:—

Where, under a post-nuptial settlement, a guilty husband was immediately entitled to one-third of his wife's property, the Court directed that until further orders the husband's portion of the income of the settled property should be paid to the wife, and in the event of her death in his lifetime, the whole of the income until further order should be applied to the benefit of the child (*f*).

The Court has refused to extinguish a guilty husband's power of appointment among his children (*g*).

Where a guilty husband was entitled to an income of about 612*l.* a year out of funds derived entirely from his father, and there were certain provisions in the settlement in case of the husband's bankruptcy, an event which had taken place some time before the divorce, the Court ordered the trustees during the life of the wife, and so long as she should remain unmarried and the children of the marriage remain under age, to pay to her the whole income of the settled property, and that as each of the

Settlements.

Guilty wife.

Policy payable at fixed date to husband if alive; if not, to wife—
"Property in reversion."

Examples of variation of settlements by Court where husband guilty of adultery. Husband's income ordered to be paid to wife, and to child after her death.

Power of appointment. Income derived from respondent's father. Respondent bankrupt.

(*d*) *Newall v. Newall and Platt* (1898), 78 L. T. 203.

(*e*) *Stedall v. Stedall* (1902), 86 L. T. 124. See also, as to extinguishment of interest of guilty wife in favour of daughters, *Beauchamp v. Beauchamp and*

Watt (1904), 20 T. L. R. 273, C. A.

(*f*) *Boynton v. Boynton* (1861), 2 S. & T. 275; 30 L. J. P. 156; 4 L. T. 258.

(*g*) *Maudslay v. Maudslay* (1877), 2 P. D. 256; 47 L. J. P. 26; 38 L. T. 323.

Settlements.

 Guilty
 husband.
 Wife's
 income.
 Settlement
 varied as
 though hus-
 band dead.
 Wife's
 property
 settled on
 husband.
 Settlement
 varied as
 though hus-
 band dead,
 subject to
 certain pay-
 ments.

children attained the age of twenty-one, a sum of 20*l.* a year be paid to such child during the life of the mother (*h*).

The fortune of a wife was settled as to a part producing 950*l.* a year on the husband for life, then on the wife for life, as to the residue, producing 1,200*l.* a year, on the wife for life, then on the husband for life, and after the decease of the survivor, in default of children of the marriage, then as to the whole property on such trusts as the wife should by will appoint, and in default of appointment on the husband absolutely. There was no issue of the marriage. The wife obtained a divorce. The husband had mortgaged his life interest for debts incurred in keeping up the joint establishment, and alleged that he had incurred other debts for the same purpose. The Court made an order that the trustees of the settlement should stand possessed of all the funds upon the trusts which would be applicable thereto if the husband had died in the lifetime of the wife, and free from the ultimate trust in default of appointment, but subject to the wife undertaking to pay the charges made by the husband on the trust funds. Held, on appeal, that the order must be affirmed, with this variation, that an account should be taken of all debts due from the husband incurred for the purposes of the joint establishment, and that the wife must undertake to pay them. Though the power given to the Court of varying settlements is not given for the purpose of punishing the guilty party, but of making due provision for the parties, their conduct is to be taken into consideration in determining what provisions ought to be made for them respectively. The judge has an absolute judicial discretion as to the provisions to be made for the parties respectively out of settled property, and the Court of Appeal will not interfere with that discretion unless there has been a clear miscarriage in its exercise (*i*).

(*h*) *Marsh v. Marsh* (1877), 47
 L. J. P. 34; 39 L. T. 107.

(*i*) *Wigney v. Wigney* (1882),
 7 P. D. 177; 51 L. J. P. 60; 46

A wife obtained a divorce, and the joint income of the husband and wife amounted to 1,500*l.* a year. Both were entitled to considerable property in reversion. The Court ordered the guilty husband to secure to the wife the sum of 700*l.* a year for her life (*k*).

Settlements.
Guilty husband.

A marriage was dissolved on a wife's petition, and practically all the property brought into settlement belonged to her. The settlement contained provisions for re-settlement by the wife after the husband's death. The Court extinguished all the husband's interests, but refused to accelerate the wife's power of re-settlement (*l*).

Wife's property.
Husband's interest extinguished.
Refusal of Court to accelerate wife's power of appointment.

By a settlement of the wife's property, the wife took the first life interest, with remainder to the husband for life if he survived her. At the death of the survivor the property was to be held in trust for such one or more of the children of a former marriage and of the then intended marriage as she should appoint. In default of appointment the property was to be divided among all her present or future children in equal shares. If the wife survived her husband, and there were at his death no children of the marriage, the trustees were to hold the fund for her benefit absolutely. On obtaining a divorce, there being no children of the marriage, the wife petitioned to have the settlement varied by extinguishing the husband's interest and holding the fund for her benefit absolutely. The Court made the order as prayed on proof that all the children of the first marriage consented, with the exception of one who could not be served with notice owing to his whereabouts being unknown (*m*).

Wife's property.
Power of appointment.
Children of former and present marriage.

Ultimate trust for husband.

Where a guilty husband had squandered his wife's

Guilty husband

L. T. 441. See also *Ponsonby v. Ponsonby* (1884), 9 P. D. 122; 53 L. J. P. 112; 51 L. T. 174.

(*k*) *Warren v. Warren* (1890), 63 L. T. 264.

(*l*) *Pollard v. Pollard*, (1894) P. 172; 63 L. J. P. 104; 70 L. T.

815. See also *Nevill v. Nevill* (1893), 69 L. T. 463; and *Hodgson Roberts v. Hodgson Roberts and Whitaker*, (1906) P. 142; 75 L. J. P. 48; 94 L. T. 621.

(*m*) *Storer v. Storer* (1894), 71 L. T. 704.

Settlements.

Guilty husband. squandering wife's property. Guilty husband's interest extinguished though all property brought into settlement by him.

Petition for variation filed by guilty party.

Chancery Division concurrent jurisdiction.

Account may be taken of income of which husband has no legal power to enforce payment.

Fund in Chancery.

property: the Court gave the wife more than one-third of the income arising from the property brought by him into settlement, during his lifetime, and after his death, one-half of such income *dum sola vixerit* (n).

The Court extinguished the whole of a guilty husband's interest where the whole of the property had been brought into settlement by him. The income was 45*l.* a year, and there was one child of the marriage who had not attained a vested interest. The Court of Appeal held that this was a proper exercise of the discretion of the Court (o).

There may be circumstances under which the Court would consider a petition for variation filed by the guilty party to a suit (p).

The Chancery Division has the same jurisdiction as the Probate Division to modify settlements, but where the matter has already been gone into in that division a judge of the Chancery Division will not interfere.

So where a post-nuptial settlement had been varied by the Probate, Divorce and Admiralty Division, on the mistaken supposition that it included certain property, in an action brought in the Chancery Division for a declaration that the settlement was void in respect of this property, the Court held that the plaintiff ought only to be granted relief, on her undertaking not to dispute the jurisdiction of the Probate, Divorce and Admiralty Division, further to deal with the property (q).

Where the Divorce Court had varied a settlement by ordering that the trustees should stand possessed of the

(n) *Bashall v. Bashall* (1897), 76 L. T. 165.

(o) *Kaye v. Kaye* (1902), 86 L. T. 638. See also *Vallance v. Vallance* (1907), 77 L. J. P. 33.

(p) *Wootton Isaacson v. Wootton Isaacson*, (1902) P. 146; 71 L. J. P. 80; 87 L. T. 147. See

Suart v. Suart (otherwise *Hodgson*), (1910) P. 246; 79 L. J. P. 86.

(q) *Allcard v. Walker*, (1896) 2 Ch. 369; 65 L. J., Ch. 660; 74 L. T. 487. See also *Blackett v. Blackett* (1884), 51 L. T. 427.

fund in trust for the person who, under the settlement, would have been entitled were the wife dead, the fund being in the Court of Chancery, the husband, as the person so next entitled, applied for an order for the payment of the income to him. The Court ordered the income to be paid to him pursuant to the order of the Divorce Court (r).

Settlements.

Where a vesting order was required to carry into effect an order for variation of settlements, the Court exercised jurisdiction under the Trustee Act, 1893, s. 35, and made a vesting order (s).

Vesting order
under Trustee
Act, 1893.

See further on the subject of this chapter, Part II., "Practice as to Variation of Settlements" (p. 480); see also "Costs," *post*, Chap. XVI. (p. 228).

(r) *Pratt v. Jenner, Jenner, Ex parte* (1866), L. R., 1 Ch. 493; 35 L. J., Ch. 682; 15 L. T. 183. See further as to variation of settlements, *Johnson v. Johnson* (1861), 31 L. J. P. 29, where the guilty husband's interest was extinguished; *Sowden v. Sowden* (1866), 15 W. R. 90, where a gross sum was applied for by an innocent wife; *Thomas v. Thomas* (1865), 13 L. T. 412, where the Court refused to order a guilty wife's jewels to be delivered up; *Bacon v. Bacon and Bacon* (1860), 2 S. & T. 86; 29 L. J. P. 125; 2 L. T. 438, where two-thirds of the guilty wife's property was settled immediately on her children, and the remaining one-third on her death or remarriage; *Pearce v. Pearce and French* (1861), 30 L. J. P. 182, where the wife's interest was extinguished; *Callwell v. Callwell and Kennedy* (1860), 3 S. & T. 259, where

the husband had covenanted for an annuity to be paid to the wife in case of her surviving him, and the Court ordered it to be paid to the children; *Harrison v. Harrison* (1886), 12 P. D. 130; 56 L. J. P. 76; 57 L. T. 119, which was a petition for permanent maintenance and variation of settlements, in which it was held by Butt, J., that "the Court in allotting permanent maintenance will not interfere with reversionary interests, except under special circumstances, as, for instance, where there are no other means of ensuring a provision for the wife"; and *Creagh v. Creagh* (1896), 74 L. T. 430, where a child's interest in a settlement was accelerated, in spite of the fact that it might thereby incur considerable subsequent loss.

(s) *Storer v. Storer* (1894), 11 R. 618.

CHAPTER XII.

DECREE AND INTERVENTION (a).

Mat. C. Act,
1860, s. 7.

Mat. C. Act,
1866, s. 3.

Time for
making decree
absolute.

Intervention,
collusion,
material
facts.

By section 7 of the Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), "Every decree for a divorce shall in the first instance be a decree *nisi*, not to be made absolute till after the expiration of such time, not less than *three months*" (extended to *six calendar months* by section 3 of the Matrimonial Causes Act, 1866 (29 & 30 Vict. c. 32), "*unless the Court shall under the power now vested in it fix a shorter time*") (b), "from the pronouncing thereof, as the Court shall by general or special order from time to time direct; and during that period *any person* shall be at liberty, in such manner as the Court shall by general or special order in that behalf from time to time direct, to *show cause* why the said decree should *not be made absolute* by reason of the same having been obtained by *collusion* or *by reason of material facts not brought before the Court*; and, on cause being so shown,

(a) Since the accession of King Edward VII., the "Queen's" Proctor has become the "King's" Proctor, but the old title has been retained here, in the Acts of Parliament as a matter of course, and also whenever a case is cited that was heard during the lifetime of her late Majesty Queen Victoria.

(b) For a case in which the Court has exercised this power, see *Fitzgerald v. Fitzgerald* (1874), L. R., 3 P. & D. 136; 43 L. J. P. 13; 31 L. T. 270. For cases in which it has refused to do so, see *Shelton v.*

Shelton and Campbell (1869), 38 L. J. P. 34; 20 L. T. 232; *Rippingall v. Rippingall and Lockhart* (1882), 48 L. T. 126; and the legislature having extended to suits for nullity of marriage the provisions of the Mat. C. Act, 1860, s. 7, the judge will not exercise his discretion to shorten the period in cases of nullity of marriage except under very special circumstances: *M. (falsely called B.) v. B.* (1874), L. R., 3 P. & D. 200; 43 L. J. P. 42; 30 L. T. 345, 910. See also *Rogers v. Rogers* (1894), 6 R. 589.

the Court shall deal with the case by making the decree absolute, or by reversing the decree *nisi*, or by requiring further inquiry, or otherwise as justice may require; and *at any time during the progress of the cause or before the decree is made absolute any person may give information to her Majesty's Proctor of any matter material to the due decision of the case*, who may thereupon take such steps as the Attorney-General may deem necessary or expedient; and if from any such information or otherwise the said Proctor shall suspect that any parties to the suit are or have been acting in *collusion* for the purpose of obtaining a divorce contrary to the justice of the case, he may, under the direction of the Attorney-General and by leave of the Court, intervene in the suit, alleging such case of collusion, and retain counsel and subpœna witnesses to prove it; and it shall be lawful for the Court to order the costs of such counsel and witnesses, and otherwise, arising from such intervention, to be paid by the parties or such of them as it shall see fit, including a wife if she have separate property; and in case the said Proctor shall not thereby be fully satisfied his reasonable costs, he shall be entitled to charge and be reimbursed the difference as part of the expense of his office."

Decree and intervention.

Mat. C. Act, 1860, s. 7.

Mat. C. Act, 1866, s. 3.

Queen's (now King's) Proctor.

By section 1 of the Matrimonial Causes Act, 1873 (36 Vict. c. 31), the provisions of the above two sections are extended to suits for nullity.

Mat. C. Act, 1860, s. 7, and

Mat. C. Act, 1866, s. 3,

extended to

suits for nullity by Mat. C. Act, 1873, s. 1.

If a decree *nisi* be rescinded, it is rescinded for all purposes and any damages which may have been given against a co-respondent fall to the ground with it, though he may still have to pay the costs (c).

Rescission of decree.

Order for new trial; effect on decree *nisi*.

An order for a new trial rescinds the decree *nisi* (d).

(c) *Hyman v. Hyman and Goldman* (King's Proctor showing cause), (1904) P. 403; 73 L. J. P. 106; 91 L. T. 361. See also *Quartermaine v. Quarter-*

maine and Glenister, (1911) P. 180.

(d) *Worsley v. Worsley and Worsley* (1904), 20 T. L. R. 171.

Decree and intervention.

Marriage still exists up to decree absolute.

Collusive agreement as to suit and costs.

Grounds for postponement of making decree absolute.

Solicitor's costs not paid.

Judgment reserved;

The marriage still continues during the interval between decree *nisi* and decree absolute, and sexual connection by either of the parties with a third person is adultery, and a material fact of which the Court is bound to take notice (*e*).

Where a husband declined to divorce his wife except on certain terms, which were agreed to by both her and the co-respondent, but he was nevertheless actuated by good motives, and his counsel frankly stated all the facts to the Court; the Court, having ordered all the papers to be sent to the Queen's Proctor, subsequently, on his intervention, rescinded the decree *nisi* and dismissed the petition on the ground of collusion; but at the same time intimated that, as there had been no concealment, the husband might file a fresh petition provided he made no agreement with the other side with respect to it (*f*).

After a verdict in favour of the petitioner, on a trial by jury, arising from an intervention, the Court postponed making the decree absolute until the time had expired for an application for a new trial (*g*).

But the fact that the petitioner had not paid his solicitor's taxed costs was held not sufficient to justify the Court in postponing making a decree absolute (*h*).

When judgment has been reserved the decree *nisi*, if pronounced, will not be antedated, but the Court may

(*e*) *Hulse v. Hulse and Taver-*
nor (1871), L. R., 2 P. & D. 259;
40 L. J. P. 51; 24 L. T. 847.
This was not, however, the
opinion of Sir Cresswell Cress-
well: *Lewis v. Lewis* (1861), 2
S. & T. 394; 30 L. J. P. 199;
4 L. T. 772. And see further as
to decrees, *Prole v. Soady* (1868),
L. R., 3 Ch. 220; *Watton v.*
Watton and Oastler (1866),
L. R., 1 P. & D. 227; 35 L. J.
P. 95; 14 L. T. 742.

(*f*) *Churchward v. Church-*
ward and Holliday (Queen's
Proctor intervening), (1895) P.
7; 64 L. J. P. 18; 71 L. T. 782.

(*g*) *Dering v. Dering and*
Blakeley (Queen's Proctor and
Others intervening) (1868),
L. R., 1 P. & D. 531; 19 L. T.
48.

(*h*) *Patterson v. Patterson*
and Graham (1870), L. R., 2 P.
& D. 192; 40 L. J. P. 4; 23
L. T. 631.

allow the time for decree absolute to run from the date of the hearing (i). Decree and intervention.

Where the Queen's Proctor applied for a postponement on affidavits that he intended to intervene, but had not been yet able to take the directions of the Attorney-General, the Court refused to make a decree *nisi* absolute, although the six months had expired (k). date of decree. Postponement on application of Queen's Proctor.

The Court made a decree absolute, notwithstanding a suggestion, supported by affidavits, that the respondent and co-respondent were dead (l). Respondent and co-respondent both dying after decree nisi.

It was held by the Court of Appeal, where a petitioner had died after decree *nisi* and before decree absolute, that his legal personal representative could not revive the suit for the purpose of applying to make the decree absolute (m). Petitioner dead, attempt to revive suit.

The Court will not make a decree absolute for dissolution on the application of the respondent (n). Decree absolute, application to make, by respondent.

But when a wife had allowed more than a year to elapse without moving to make absolute a decree *nisi* which she had obtained for a dissolution of her marriage, the Court, on respondent's application, held that petition must be dismissed for want of prosecution, unless within a week petitioner applied to make decree absolute (o). Petition dismissed where petitioner failed to apply to make decree absolute.

And when a wife, having obtained a decree *nisi* for dissolution of her marriage, did not apply to make it absolute for six weeks after the six months had elapsed, the respondent then applied to have the petition dismissed.

(i) *Houghton v. Houghton*, L. R., 1 P. & D. 531; 37 L. J. (1903) P. 150; 72 L. J. P. 31; P. 52; 19 L. T. 48.

(k) *Hamilton v. Hamilton and Riding* (1875), 33 L. T. 462; (1886), 11 P. D. 103; 55 L. J. P. 36; 54 L. T. 906.

Palmer v. Palmer (1865), 4 S. & T. 143; 34 L. J. P. 110. (n) *Ousey v. Ousey and Atkinson* (1875), 1 P. D. 56; 45 L. J. P. 56; 33 L. T. 789.

(l) *Dering v. Dering and Blakeley* (Queen's Proctor and Others intervening) (1898), 212; 61 L. J. P. 95; 67 L. T. 358.

(o) *Lewis v. Lewis*, (1892) P. 212; 61 L. J. P. 95; 67 L. T. 358.

Decree and
intervention.

This application was refused and adjourned for some six weeks in order to give the wife time to make up her mind, and at the end of that time at the *wife's* request the Court rescinded the decree *nisi* and gave her instead a decree of judicial separation (*p*).

Intervention :
nullity suit.

There was no right of intervention in suits for nullity previous to the passing of the Matrimonial Causes Act, 1873 (36 Vict. c. 31), s. 1, which has been already cited at the commencement of this chapter (*q*), but the extinct Courts used to allow third parties to be cited where they were interested in the validity of a marriage disputed in the suit (*r*).

King's
Proctor,
intervention
by.
Mat. C. Act,
1860, s. 7.

Section 7 of the Matrimonial Causes Act, 1860, confers on the King's Proctor the power to intervene in the case of *collusion*, but *in that alone*; and except in such a case, if he takes any proceedings in a suit for divorce, he appears only as one of the public giving information to the Court (*s*).

"*Collusion*"
means
"*collusion*"
in that suit
only, not
previous suit.

The "*collusion*" referred to in section 30 of the Matrimonial Causes Act, 1857, means collusion in the suit pending (*t*).

(*p*) *Parsons v. Parsons*, (1907) P. 331.

(*q*) See *D. v. M.* (1873), 28 L. T. 73.

(*r*) *Montague v. Montague* (1824), 2 Add. 372; *Chichester v. Donegal* (1822), 1 Add. 5; and see *M. v. M. (otherwise A.)* (1897), 76 L. T. 172, where the Court, in an undefended nullity suit, ordered information as to the facts of the case to be sent to the Queen's Proctor.

(*s*) *Lautour v. Queen's Proctor* (1864), 33 L. J. P. 89; 10 H. L. C. 685; 10 L. T. 611. See also *Masters v. Masters* (Queen's Proctor intervening) (1864), 34

L. J. P. 7; *Hudson v. Hudson and Poole* (1875), 1 P. D. 65; 45 L. J. P. 39; 33 L. T. 788; *Boulton v. Boulton and Page* (1861), 2 S. & T. 551; 31 L. J. P. 76; 6 L. T. 693; and as to intervention by one of the public, *Bowen v. Bowen and Evans* (Queen's Proctor intervening) (1864), 3 S. & T. 530; 33 L. J. P. 129; *Clements v. Clements and Thomas* (Eames and Burroughs intervening) (1864), 33 L. J. P. 74; 3 S. & T. 394; 10 L. T. 352.

(*t*) *Butler v. Butler* (Queen's Proctor intervening), (1893) P. 185; 62 L. J. P. 105; 69 L. T. 54; 1 R. 521.

The King's Proctor ought not to intervene before decree *nisi*, except in cases where he charges collusion (*u*). In the case of *Jackson v. Jackson* (*x*), at the hearing it was admitted by the petitioner that she had committed adultery, but she asked the Court to exercise its discretion. The judge, however, adjourned the hearing that the papers might be sent to the King's Proctor. Upon motion by the King's Proctor for directions, it was held that as the Court could not compel the Attorney-General to issue his fiat, the case would have to remain in the reserve list.

Decree and intervention.

Time for intervention.

If the King's Proctor comes to the conclusion that a decree has been obtained contrary to the justice of the case, then it is his duty to intervene (*y*).

Decree obtained contrary to justice of case.

The fact that material facts have not been brought to the notice of the Court is a sufficient ground for intervention whether such facts have been intentionally or accidentally withheld (*z*).

Material facts not brought to notice of Court.

The Court cannot beforehand limit the right of the King's Proctor to lay material facts before it (*a*).

If "*material facts*" have been kept from the knowledge of the Court, but it appears on all the facts being known that the petitioner is nevertheless entitled to a divorce, the Court will not refuse to make the decree absolute.

Material facts kept from knowledge of Court, petitioner entitled to divorce notwithstanding.

The Court may even exercise its discretion and grant a decree although the petitioner may have been guilty of misconduct (*b*), or where the material fact that the

(*u*) *Hudson v. Hudson and Poole* (1875), 1 P. D. at p. 168, per Hannen, P.

(*x*) (1910) P. 230; 79 L. J. P. 59; 102 L. T. R. 862.

(*y*) *Crawford v. Crawford and Dilke* (Queen's Proctor intervening) (1886), 11 P. D. at p. 157, per Hannen, P.

(*z*) *Howarth v. Howarth* (1884), 9 P. D. at p. 225, per Cotton, L. J.

(*a*) *Gladstone v. Gladstone* (1875), L. R., 3 P. & D. 263, per Hannen, P.

(*b*) *Pretty v. Pretty* (King's Proctor showing cause), (1911) P. 83; 104 L. T. 79.

Decree and
intervention.

husband had deserted the wife before her adultery was not disclosed to the Court, the Court still exercised its discretion and allowed the decree to be made absolute upon terms (c).

Agreement to
suppress
material facts
amounting
to collusion.

So where a petition contained two charges of adultery and alleged that neither of them had been condoned, and the Queen's Proctor intervened and proved condonation of one adultery, but not of the other, the Court made a decree absolute on the ground of the uncondoned adultery, notwithstanding the suppression of the material fact of condonation of the other adultery (d). But if a petition is prosecuted in collusion—and agreement between parties to a divorce suit to suppress material and pertinent facts amounts to collusion—the Court will not make the decree absolute, even though such facts might not have been sufficient to support a countercharge (e).

Decree nisi
alleged to
have been
granted on
untrue
charge.

The King's Proctor may intervene to show cause why a decree should not be made absolute on the ground that the charge of adultery on which it was granted was not true, and he is at liberty to adduce evidence of fresh material facts (f).

Howarth v.
Howarth.

In *Howarth v. Howarth* (g), it was held by the Court of Appeal:—

Mat. C. Act,
1860, s. 7.
Intervention
by any
person.

1. That the Act 23 & 24 Vict. c. 144, s. 7, authorizes intervention by any person where material facts have not been brought before the Court, whether by intention or through accident.

(c) *Freeman v. Freeman and Freeman* (1911), 105 L. T. R. 383.

(d) *Alexandre v. Alexandre* (Queen's Proctor intervening) (1870), L. R., 2 P. & D. 164; 39 L. J. P. 84; 23 L. T. 268.

(e) *Butler v. Butler; Butler v. Butler and Burnham* (Queen's Proctor intervening) (1890), 15 P. D. 66; 59 L. J. P. 25; 62

L. T. 344. See also *Churchward v. Churchward and Holliday* (Queen's Proctor intervening), (1895) P. 7; 64 L. J. P. 18; 71 L. T. 782.

(f) *Crawford v. Crawford and Dilke* (Queen's Proctor intervening) (1886), 11 P. D. 150; 55 L. J. P. 42; 55 L. T. 304.

(g) (1884), 9 P. D. 218; 51 L. T. 872.

2. That it is doubtful whether where the petitioner, after the decree *nisi*, is guilty of conduct disentitling him or her to have the decree made absolute, the right to intervene is confined to the Queen's Proctor (?). Decree and intervention.
Misconduct after decree *nisi*.

3. That where a respondent is not entitled to a new trial, intervention on the ground of fresh evidence as to acts prior to the decree *nisi* will not be allowed if the intervener is merely acting on behalf of, and in collusion with, the respondent; but the fact that he is a near relative of the respondent is no ground for rejecting the intervention. Intervention on behalf of respondent.

A respondent against whom a decree *nisi* for dissolution of marriage has been pronounced cannot personally intervene to prevent the decree being made absolute. His or her only remedies are, either to procure the intervention of the King's Proctor or to move for a new trial (*h*). Intervention by respondent.

Neither will the Court, in a nullity suit on the ground of impotence, make a decree absolute on the application of the respondent (*i*). Nullity suit.

Where, in opposition to a decree *nisi*, an appearance was entered on behalf of an individual who—it subsequently appeared—had not authorized the intervention, and an appearance was *then* entered on behalf of another intervener, the Court refused to take notice of the intervention of such other intervener (*k*). Unauthorized intervention.

It has been held that the Court will not allow a petitioner to take his petition off the file (*l*), or to alter a prayer Changing prayer of petition to

(*h*) *Stoate v. Stoate* (1861), 30 L. J. P. 173; 2 S. & T. 384; 5 L. T. 138. See also *Pattenden v. Pattenden and Herzfield* (1868), 19 L. T. 612.

(*i*) *Halfen (otherwise Boddington) v. Boddington* (1881), 6 P. D. 13; 50 L. J. P. 61; 44 L. T. 252.

(*k*) *Clements v. Clements and Thomas* (Eames and Burroughs

intervening) (1864), 3 S. & T. 394; 33 L. J. P. 74; 10 L. T. 352. See also *Forster v. Forster and Berridge* (Graham intervening) (1863), 3 S. & T. 151; 32 L. J. P. 206; 9 L. T. 148.

(*l*) *Gray v. Gray* (Queen's Proctor intervening) (1861), 2 S. & T. 266; 30 L. J. P. 119; 4 L. T. 478.

Decree and
intervention.

Oust King's
Proctor.

Admission by
petitioner.

Court sending
papers to
Queen's
Proctor.

Mat. C. Act,
1860, s. 5.

Court of
Appeal.
Judicature
Act, 1873,
s. 19.

Intervention
in custody of
children.

for dissolution into a prayer for judicial separation (*m*), for the purpose of ousting the King's Proctor.

When the King's Proctor alleges matter which would be ground for reversing a decree *nisi*, and such allegations are admitted by the petitioner, the Court will act on such admission without requiring further proof (*n*).

By section 5 of the Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), "In every case of a petition for a dissolution of marriage it shall be lawful for the Court, if it shall see fit, to direct all necessary papers in the matter to be sent to Her Majesty's Proctor, who shall, under the directions of the Attorney-General, instruct counsel to argue before the Court any question in relation to such matter, and which the Court may deem it necessary or expedient to have fully argued; . . ."

In a case where a husband had been long absent in New Zealand, a decree *nisi* was pronounced on his petition, but the papers were ordered to be laid before the Queen's Proctor for inquiry into the facts of the case (*o*).

And, by virtue of section 19 of the Judicature Act, 1873, the same power to direct the papers to be sent to the Queen's Proctor is also vested in the Court of Appeal (*p*).

Another kind of intervention arises under the Matrimonial Causes Act, 1857, s. 35, and the Matrimonial

(*m*) *Drummond v. Drummond* (Queen's Proctor intervening) (1861), 2 S. & T. 269; 30 L. J. P. 177; 4 L. T. 416.

(*n*) *Boulton v. Boulton and Page* (1861), 31 L. J. P. 115. See also *Pollack v. Pollack, Deane and Macnamara* (1863), 4 S. & T. 266; 34 L. J. P. 49; *Sheldon v. Sheldon* (Queen's Proctor intervening) (1865), 4 S. & T. 75; 34 L. J. P. 80.

(*o*) *Stevens v. Stevens and*

Field (1890), 61 L. T. 844. See also *Boulton v. Boulton and Page* (1861), 2 S. & T. 405; 31 L. J. P. 27; 5 L. T. 362. See also *Churchward v. Churchward and Holliday* (Queen's Proctor intervening), (1895) P. 7; 64 L. J. P. 18; 71 L. T. 782; and *M. v. M. (otherwise A.)*, ante, p. 196, note (*r*).

(*p*) *Le Sueur v. Le Sueur* (1877), 2 P. D. 80; 36 L. T. 276.

Causes Act, 1859, s. 4; for the Court will allow persons who are not parties to a suit to intervene and plead upon the question of the custody, maintenance and education of the children of parents whose marriage is the subject of the suit, as to which see "Custody of and Access to Children," *ante*, Chap. VIII. (p. 139).

Decree and intervention.

Mat. C. Act, 1857, s. 35;

Ibid.

1859, s. 4.

Where a respondent denied the allegations of the petition, and the issues came on for trial at the same time as an issue raised on a plea of the Queen's Proctor "that the petition had been filed by arrangement with the respondent and others acting on his behalf," the Court held that the Queen's Proctor had nothing to do with the issues between the parties, and that his counsel had no right to comment on the evidence relating to them (*q*).

Issues between parties and issue by Queen's Proctor heard at same time.

Where a husband in his answer alleged adultery against his wife, but did not ask for a dissolution, the Court gave the alleged adulterer leave to intervene (*r*).

Intervention of party charged with adultery.

Where a wife charged her husband with adultery with a certain lady, and with "*other women unknown*," and the husband's counsel stated that he was not in a position to contest the adultery, the lady specifically charged obtained leave to intervene, and succeeded in negating the charges made against her (*s*).

Where an answer to a petition for dissolution charges misconduct with third persons, but claims no relief of any sort or kind, such third persons will not be allowed to intervene.

Charges made in answer, but no relief claimed.

Party charged not allowed to intervene.

But if the answer claims relief, it will be treated as a cross-petition, and intervention will be allowed (*t*).

Secus, where relief claimed.

(*q*) *Jessop v. Jessop* (1861), 2 S. & T. 301; 30 L. J. P. 193; 4 L. T. 308. See also *Studholme v. Studholme and Cullum* (Queen's Proctor showing cause) (1876), 25 W. R. 165.

Rhodes (1889), 14 P. D. 154; 58 L. J. P. 65; 61 L. T. 306.

(*s*) *Wade v. Wade* (Brooke intervening), (1903) P. 16; 72 L. J. P. 1; 87 L. T. 751.

(*t*) *Lowe v. Lowe*, (1899) P. 204; 68 L. J. P. 60; 80 L. T.

(*r*) *Wheeler v. Wheeler and*

Decree and intervention.

Intervention by co-respondent.

Intervention by party charged by King's Proctor with committing adultery with petitioner.

Parties coming together after decree *nisi*.

Unreasonable delay alleged in King's Proctor's plea.

Application by petitioner to rescind decree.

A co-respondent who had appeared in a divorce suit, but had not defended, was not afterwards allowed to show cause against the decree being made absolute (*u*).

Where the King's Proctor has intervened and alleged adultery on the part of the petitioner in a divorce suit, the Court has no power to allow the person with whom such adultery is alleged to have been committed to intervene in the proceedings (*x*).

Where after decree *nisi* the parties came together again, the Court, on motion of Queen's Proctor, without requiring him to file a plea, rescinded the decree *nisi*, and dismissed petition on being satisfied as to facts (*y*).

It has been held that where "unreasonable delay in presenting the petition" is the ground for seeking to rescind a decree *nisi*, the question for the jury is, whether the petitioner knew, or had reason to believe, that the respondent had been guilty of adultery two years or more before presenting his petition (*z*).

The King's Proctor intervened in a nullity suit, petitioner having already instructed her solicitor to take steps to get the decree *nisi* rescinded. The Court allowed the decree to be rescinded and the petition dismissed on the petitioner's own motion, with the consent of the King's Proctor (*a*).

575; *Harrop v. Harrop*, (1899) P. 61; 68 L. J. P. 58; 80 L. T. 171.

(*u*) *Harries v. Harries and Gregory* (1901), 80 L. T. 262.

(*x*) *Grieve v. Grieve* (Queen's Proctor intervening), (1893) P. 288; 63 L. J. P. 29; 69 L. T. 462. See also *Carew v. Carew* (Queen's Proctor showing cause), (1894) P. 31; 63 L. J. P. 74.

(*y*) *Flower v. Flower and Others*, (1893) P. 290; 63 L. J. P. 28.

(*z*) *Brougham v. Brougham* (Queen's Proctor intervening), (1895), P. 288; 64 L. J. P. 125.

(*a*) *A. (otherwise B.) v. A.* (King's Proctor intervening), (1901) P. 284; 70 L. J. P. 90; 85 L. T. 171; and see further as to intervention of Queen's Proctor generally, *Bell v. Bell* (Queen's Proctor intervening) (1889), 58 L. J. P. 54; *Rogers v. Rogers* (Queen's Proctor showing cause), (1894) P. 161; 63 L. J. P. 97; 70 L. T. 699.

The Court refused to allow a lady charged with adultery on a wife's petition for judicial separation to intervene, on the ground that the practice of the Ecclesiastical Courts governed the case, and that practice afforded no precedent for an intervention under such circumstances (b).

Decree and
intervention.

Intervention
in suit for
judicial
separation.

See further on the subject of this chapter, Part II., tit. "Decree and Intervention" (p. 487); see also "Costs," *post*, Chap. XVI. (p. 228).

(b) *Farrell v. Farrell* (1897), 76 L. T. 167.

CHAPTER XIII.

LEGITIMACY DECLARATION ACT, 1858.

21 & 22 Vict. c. 93. THIS Act (21 & 22 Vict. c. 93) is declared by its heading to be

“An Act to enable Persons to establish Legitimacy and the Validity of Marriages, and the Right to be deemed natural-born Subjects.”

Application to Court for Divorce and Matrimonial Causes for declaration of legitimacy or validity or invalidity of marriage.

By section 1, “Any natural-born subject of the Queen, or any person whose right to be deemed a natural-born subject depends wholly or in part on his legitimacy or on the validity of a marriage, being domiciled in *England* or *Ireland*, or claiming any real or personal estate situate in *England*, may apply by petition to the Court for Divorce and Matrimonial Causes, praying the Court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother, or of his grandfather and grandmother, was a valid marriage, or for a decree declaring either of the matters aforesaid; and any such subject or person, being so domiciled or claiming as aforesaid, may in like manner apply to such Court for a decree declaring that his marriage was or is a valid marriage; and such Court shall have jurisdiction to hear and determine such application and to make such decree declaratory of the legitimacy or illegitimacy of such person, or of the validity or invalidity of such marriage, as to the Court may seem just; and such decree, except as hereinafter mentioned, shall be binding to all intents and purposes on Her Majesty and on all persons whomsoever.”

By section 2, "Any person, being so domiciled or claiming as aforesaid, may apply by petition to the said Court for a decree declaratory of his right to be deemed a natural-born subject of Her Majesty; and the said Court shall have jurisdiction to hear and determine such application, and to make such decree thereon as to the Court may seem just; and where such application as last aforesaid is made by the person making such application as herein mentioned for a decree declaring his legitimacy or the validity of a marriage, both applications may be included in the same petition; and every decree made by the said Court shall, except as hereinafter mentioned, be valid and binding to all intents and purposes upon Her Majesty and all persons whomsoever."

21 & 22 Vict.
c. 93.

Application
to Court for
declaration
of right to be
deemed a
natural-born
subject.

By section 3, "Every petition under this Act shall be accompanied by such affidavit verifying the same, and of the absence of collusion, as the Court may by any general rule direct."

Petition to be
accompanied
by affidavit.

By section 4, "All the provisions of the Act of the last session, chapter eighty-five, so far as the same may be applicable, and the powers and provisions therein contained in relation to the making and laying before Parliament of rules and regulations concerning the practice and procedure under that Act, and fixing the fees payable upon proceedings before the Court, shall extend to applications and proceedings in the said Court under this Act, as if the same had been authorized by the said Act of the last session."

Mat. C. Act,
1857 (20 & 21
Vict. c. 85),
to apply to
proceedings
under this
Act.

By section 5, "In all proceedings under this Act the Court shall have full power to award and enforce payment of costs to any person cited, whether such persons shall or shall not oppose the declaration applied for, in case the said Court shall deem it reasonable that such costs shall be paid."

Power to
award and
enforce
payment of
costs.

By section 6, "A copy of every petition under this Act, and of the affidavit accompanying the same, shall, one month at least previously to the presentation or filing of

Attorney-
General to
have a copy
of petition

21 & 22 Vict.
c. 93.

one month
before it is
filed, and to
be respondent.
Court may
require
persons to be
cited.

Saving for
rights of
persons not
cited.

Person domi-
ciled in
Scotland
may insist,
on an action
of declarator,
that he is a
natural-born
subject.

No proceed-
ings to affect
final judg-
ments, &c.
already pro-
nounced.

such petition, be delivered to Her Majesty's Attorney-General, who shall be a respondent upon the hearing of such petition and upon every subsequent proceeding relating thereto."

By section 7, "Where any application is made under this Act to the said Court, such person or persons (if any), besides the said Attorney-General, as the Court shall think fit, shall, subject to the rules made under this Act, be cited to see proceedings or otherwise summoned in such manner as the Court shall direct, and may be permitted to become parties to the proceedings, and oppose the application."

By section 8, "The decree of the said Court shall not in any case prejudice any person, unless such person has been cited or made a party to the proceedings or is the heir-at-law or next of kin, or other real or personal representative of or derives title under or through a person so cited or made a party; nor shall such sentence or decree of the Court prejudice any person if subsequently proved to have been obtained by fraud or collusion."

By section 9, "Any person domiciled in *Scotland*, or claiming any heritable or moveable property situate in *Scotland*, may raise and insist in an action of declarator before the Court of Session, for the purpose of having it found and declared that he is entitled to be deemed a natural-born subject of Her Majesty; and the said Court shall have jurisdiction to hear and determine such action of declarator, in the same manner and to the same effect, and with the same power to award expenses, as they have in declarators of legitimacy and declarators of bastardy."

By section 10, "No proceeding to be had under this Act shall affect any final judgment or decree already pronounced or made by any Court of competent jurisdiction" (a).

(a) It was held in *Shedden v. Att.-Gen.* (1860), 2 S. & T. 170; 30 L. J. P. 217; 3 L. T. 592,

that this section does not prevent the Court from inquiring into the merits of a petition, but only that

By section 11, "The said Act of the last session" (*i.e.*, *the Matrimonial Causes Act, 1857*) "and this Act shall be construed together as one Act; and this Act may be cited for all purposes as 'The Legitimacy Declaration Act, 1858.'"

21 & 22 Vict.
c. 93.

Acts to be
read together.

The following extract, defining the exact meaning of the word "legitimacy," is from "Conflict of Laws," by A. V. Dicey, 2nd ed., 1908, p. 479:—

Extract from
Dicey's
"Conflict
of Laws."

"Rule 136.—A child born anywhere in lawful wedlock is legitimate.

"Rule 35.—The law of the father's domicile at the time of the birth of a child born out of lawful wedlock, and the law of the father's domicile at the time of the subsequent marriage of the child's parents, determine whether the child becomes, or may become, legitimate in consequence of the subsequent marriage of the parents (*legitimitio per subsequens matrimonium*).

"Case 1.—If both the law of the father's domicile at the time of the birth of the child and the law of the father's domicile at the time of the subsequent marriage allow of *legitimitio per subsequens matrimonium*, the child becomes, or may become, legitimate on the marriage of the parents.

"Case 2.—If the law of the father's domicile at the time of the birth of the child does not allow of *legitimitio per subsequens matrimonium*, the child does not become legitimate on the marriage of the parents.

"Case 3.—If the law of the father's domicile at the time of the subsequent marriage of the child's parents does not allow of *legitimitio per subsequens matrimonium*, the child does not become legitimate on the marriage of the parents."

its decree shall not have any effect upon the final judgment already pronounced of another competent Court.

21 & 22 Vict.
c. 93.

Real estate,
title to.

*Lex loci rei
sitæ.*

Domicil of
petitioner
foreign.
No property
in England.

Evidence.
Declarations
of members
of family.

Meaning of
term *post
litem motam*.

In deciding the title to real estate, the *lex loci rei sitæ* must always prevail, so that a person legitimate by the law of his birthplace and of the place where his parents were married may possibly not be regarded as legitimate for the purpose of taking a real estate elsewhere (*b*).

Where the domicil of a petitioner for a declaration of legitimacy was Australia, and there was no property in England to which he could succeed, the Court dismissed the petition, although it contained a prayer that the Court would declare null and void a certain pretended marriage of the petitioner's mother (*c*).

Declarations of members of the family in questions of legitimacy are not admissible if made *post litem motam*, whether the *lis* be known or not known to the persons making the declarations. To constitute *lis mota* for this purpose, there must have been controversy in respect of the very point as to which the evidence is tendered (*d*).

Where the question in litigation was whether A., a man, and B., a woman, were lawfully married in 1773, a letter from C., one of their sons, to D., his uncle, the woman's brother, was put in evidence, in which C. wrote: "What I want to do is to establish my legitimacy, and whether I have a right to the estate I know not," D. being then in possession of an estate which had been devised to B. and to her issue lawfully begotten, and in default of such issue to D. A letter was also put in evidence written by D. to E., the brother of A., informing him of C.'s claim, and adding, "With regard to myself, the estate I hold I cannot give up, as it is entailed on my children." The Court held that these letters, written in 1800, constituted the beginning of a controversy upon the validity of the marriage of A. and B., although no step was taken to litigate

(*b*) *Fenton v. Livingstone and Hawkins* cited (1873), 43 (1859), 3 Macq. H. L. C. 497, L. J. P. 3; 29 L. T. 547.

(*d*) *Shedden v. Att.-Gen.* (1860), 2 S. & T. 170; 30 L. J. P. 217; 3 L. T. 592.

that question until 1873; and that all declarations by members of both families subsequent to 1800 were *post litem motam*, and therefore inadmissible in evidence (e). 21 & 22 Vict. c. 93. —

The presumption in favour of the legitimacy of a child born in wedlock is not a *presumptio juris et de jure*, but may be rebutted by evidence, which must be clear and conclusive, and not resting merely on a balance of probabilities. Thus in a suit for declaration of legitimacy where a child had been born 276 days after the last opportunity of intercourse between the husband and wife, and where there was evidence in the wife's conduct tending to show that she regarded the child as the offspring of her paramour, the president directed the jury that it was for them to say whether, on the whole of the evidence, the conviction had been brought home to their minds that the husband was not the father of the child (f). Presumption of legitimacy of child born in wedlock. Duration of pregnancy.

So where in a suit to perpetuate testimony, Earl Poulett, who died in 1899, deposed that he had never had intercourse with his wife (who less than six months after marriage gave birth to a full-grown child) before marriage; that soon after marriage his wife confessed to him that she was pregnant by another man, and that thereupon he separated from his wife and never acknowledged the child; the Court held that this evidence was admissible against the child's legitimacy (g). Legitimacy of child begotten before marriage. Evidence of paternity admissible.

On a summons for maintenance of children against a husband who had been living apart from his wife some Husband's admission of paternity.

(e) *Frederick v. Att.-Gen.* (1874), L. R., 3 P. & D. 270; 44 L. J. P. 1; 32 L. T. 39.

(f) *Bosville v. Att.-Gen., Bosville and Others cited* (1887), 12 P. D. 177; 56 L. J. P. 97; 57 L. T. 88. In the course of the judgment in this case, the following case was cited: *Morris v. Davies* (1836), 5 Cl. & F. 163. As to the presumption of the legitimacy of

a child born shortly after marriage, see *In re Parsons* (1868), 18 L. T. 704. See also *Evans v. Evans and Blyth*, (1904) P. 274; 73 L. J. P. 87; 91 L. T. 356.

(g) *Poulett Peerage Claim*, (1903) A. C. 395; 72 L. J., K. B. 924 (H. L.). See also *Burnaby v. Baillie* (1889), 42 Ch. D. 282; 58 L. J., Ch. 842; 61 L. T. 634.

21 & 22 Vict.
c. 93.

Jurisdiction.

Title of
honour.

Marriage
apparently
bigamous.

Legitimacy of
petitioner's
grandfather.
Jurisdiction
of Court.

Citing third
parties under
s. 7.

Court will
not decide
who may be
cited.

Japanese
marriage,
validity of.

time before their birth, it was held that the husband's evidence was not admissible to contradict evidence given by other witnesses as to his admission of paternity (*h*).

This Act gives the Court no jurisdiction to investigate or decide upon a claim to a title of honour only (*i*).

Where a man and woman were married, the woman having previously gone through the ceremony of marriage with another man, whose wife was living at the time, the Court held that it had jurisdiction under the first section of the Legitimacy Declaration Act to pronounce a decree declaring their marriage valid (*k*).

But the Probate Division has no power under this Act to make a decree establishing the legitimacy of the petitioner's grandfather, and the Court commented on the insufficiency of the Act in this respect (*l*).

When the petition has been filed, the petitioner should apply to the Court for leave if he desire to cite individuals to see proceedings, and show sufficient reason why they should be cited (*m*).

The Court will not take upon itself to decide who shall be cited. It is for the petitioner to name whom he wishes to be cited, and to show that it is fitting he be so cited (*n*).

The petitioner, a British subject with an Irish domicile of origin, was temporarily resident in Japan. Whilst there he married a Japanese woman according to the law of Japan. The Court on proof of the legality of the marriage according to Japanese law, and also that according to that law the petitioner was precluded from marrying any other woman during the subsistence of the

(*h*) *Ulverstone Union v. Park* (1874), 22 W. R. 831.
(1889), 53 J. P. 629.

(*i*) *Frederick v. Att.-Gen.* and 42 L. T. 402.

Frederick cited to see proceedings (*m*) *In re Shedden* (1859), 5
(1874), L. R., 3 P. & D. 196; Jur., N. S. 151.

43 L. J. P. 32; 30 L. T. 767. (*n*) *Upton v. Att.-Gen.* (1863),

(*k*) *Shilson v. Att.-Gen.* 32 L. J. P. 177.

marriage, held that the marriage was valid in this country, and the children consequently legitimate (o). 21 & 22 Vict. c. 93.

The Court will recognize the binding effect of a decree of divorce obtained in a foreign country where the husband was not domiciled, if the Courts of the country of his domicile would recognize the validity of the decree (p). American divorce, validity of.

The Court, on being satisfied by evidence of the validity of a Gretna Green marriage in 1846, according to the law of Scotland, pronounced a declaration of legitimacy (q). Gretna Green marriage.

Where a man and woman are proved to have lived together as man and wife for a considerable time, the law will presume that there has been a valid marriage, unless the contrary is clearly proved; and where it is proved that there was an intention to marry, and that some form was gone through to perfect that intention, those who claim by virtue of the marriage are not bound to prove that all necessary ceremonies were performed according to law (r). Presumption of marriage from cohabitation. Intention.

C. died intestate at the age of 73 or thereabouts, There was no official record of his birth in existence, or of the marriage of his parents. The Court accepted an extract from a certificate in the Scotch form of the marriage of C.'s brother, containing a full description of both his parents, as evidence of C.'s legitimacy (s). Extract from Scotch marriage certificate accepted as evidence of legitimacy of bridegroom's brother.

See further, as to the practice under the Legitimacy Declaration Act, 1858, and the Greek Marriages Act (47 & 48 Vict. c. 20), which is identical with it, Part II., tit. "Legitimacy Declaration Act" (p. 498). See also "Costs," *post*, Chap. XVI. (p. 228).

- (o) *Brinkley v. Att.-Gen.* (1890), 15 P. D. 76; 59 L. J. P. 51; 62 L. T. 91. See also *Shaw v. Att.-Gen.* (1870), L. R., 2 P. & D. 156; 39 L. J. P. 81; 23 L. T. 322; *Scott v. Att.-Gen.* (1886), 11 P. D. 128; 55 L. J. P. 57; 56 L. T. 924; *Warter v. Warter* (1890), 15 P. D. 152; 59 L. J. P. 87; 63 L. T. 250.
- (p) *Armitage v. Att.-Gen.* (Gillig cited), (1906) P. 135; 75 L. J. P. 42; 94 L. T. 614.
- (q) *Gardner v. Att.-Gen.* (1889), 60 L. T. 839.
- (r) *Shephard, In re, George v. Thyer*, (1904) 1 Ch. 456; 73 L. J., Ch. 401; 90 L. T. 249.
- (s) *Wigley v. Solicitor to the Treasury*, (1902) P. 233; 71 L. J. P. 115.

CHAPTER XIV.

SUMMARY JURISDICTION (MARRIED WOMEN) ACT, 1895.

58 & 59 Vict.
c. 39. THE above Act, terms of which follow *in extenso*, came into operation on January 1st, 1896 (*a*).

A.D. 1895. An Act to amend the Law relating to the Summary Jurisdiction of Magistrates in reference to Married Women. [6th July, 1895.]

S. 1.
Short title. 1. This Act may be cited for all purposes as the Summary Jurisdiction (Married Women) Act, 1895.

S. 2. 2. This Act shall not extend to Scotland or Ireland.

S. 3.
Application of Act.

3. This Act shall come into operation on the first day of January, one thousand eight hundred and ninety-six.

S. 3.
Commence-
ment of Act.

S. 4.
By and to
whom orders
may be ap-
plied for.

24 & 25 Vict.
c. 100.

4. Any married woman whose husband shall have been convicted summarily of an aggravated assault upon her within the meaning of section forty-three of the Offences against the Person Act, 1861, or whose husband shall have been convicted upon indictment of an assault upon her, and sentenced to pay a fine of more than five pounds or to a term of imprisonment exceeding two months, or whose husband shall have deserted her, or whose husband shall have been guilty of persistent cruelty (*a*) to her, or wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain, and shall by such cruelty or neglect have caused her to leave and live separately and apart from him (*b*), may apply to any court of summary

(*a*) It would seem that a number of acts of cruelty, committed on one day, may amount to persistent cruelty: *Broad v. Broad*

(1898), 78 L. T. 687.

(*b*) This provision, requiring the wife to have left the home before she can obtain

jurisdiction acting within the city, borough, petty sessional or other division or district, in which any such conviction has taken place, or in which the cause of complaint shall have wholly or partially arisen, for an order or orders under this Act: Provided that where a married woman is entitled to apply for an order or orders under this section on the ground of the conviction of her husband upon indictment she may apply to the court before whom her husband has been convicted, and that court shall, for the purposes of this section, become a court of summary jurisdiction, and shall have the power without a jury to hear an application, and make the order or orders applied for (*c*).

58 & 59 Vict.
c. 39.

By and to
whom orders
may be
applied for.

5. The court of summary jurisdiction to which any application under this Act is made may make an order or orders containing all or any of the provisions following, viz.:—

S. 5.
Powers of
Court.

- (a) A provision that the applicant be no longer bound to cohabit with her husband (which provision while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty):
- (b) A provision that the legal custody of any children of the marriage between the applicant and her husband, while under the age of sixteen years, be committed to the applicant:
- (c) A provision that the husband shall pay to the applicant personally, or for her use, to any officer of the court or third person on her behalf, such weekly sum, not exceeding two pounds, as the

Judicial
separation.

Custody of
children.

Maintenance.

the benefit of this section, is a great hardship, and has been found in practice to be a serious difficulty, and it is to be hoped that the law will be amended in this respect.

(c) Where a husband was indicted for shooting at his wife

with intent to murder, and convicted of a common assault only, the judge refused to make a separation order under this section and section 5, stating that the section did not apply to the case: *Reg. v. Corrigan* (1898), 62 J. P. 522.

58 & 59 Vict.
c. 39.

Costs.

court shall, having regard to the means both of the husband and wife, consider reasonable:

- (d) A provision for payment by the applicant or the husband, or both of them, of the costs of the court and such reasonable costs of either of the parties as the court may think fit.

S. 6.
Limitations
of powers of
Court.

6. No orders shall be made under this Act on the application of a married woman if it shall be proved that such married woman has committed an act of adultery: Provided that the husband has not condoned, or connived at, or by his wilful neglect or misconduct condoned to such act of adultery.

S. 7.
Court may
vary or dis-
charge order.

7. A court of summary jurisdiction acting within the city, borough, petty sessional or other division or district, in which any order under this Act or the Acts mentioned in the schedule hereto, or either of them, has been made, may, on the application of the married woman or of her husband, and upon cause being shown upon fresh evidence to the satisfaction of the Court at any time, alter, vary, or discharge any such order, and may upon any such application from time to time increase or diminish the amount of any weekly payment ordered to be made, so that the same do not in any case exceed the weekly sum of two pounds. If any married woman upon whose application an order shall have been made under this Act, or the Acts mentioned in the schedule hereto, or either of them, shall voluntarily resume cohabitation with her husband, or shall commit an act of adultery, such order shall upon proof thereof be discharged.

S. 8.
Procedure.

8. All applications under this Act shall be made in accordance with the Summary Jurisdiction Acts, and, in the case of a conviction of a husband for aggravated assault upon his wife, her application may, by leave of the Court, be made by summons to be issued and made returnable immediately upon such conviction.

S. 9.
Enforcement
of orders for

9. The payment of any sum of money directed to be paid by any order under this Act may be enforced in the

same manner as the payment of money is enforced under an order of affiliation. 58 & 59 Vict. c. 39.

10. If in the opinion of a court of summary jurisdiction the matters in question between the parties or any of them would be more conveniently dealt with by the High Court, the court of summary jurisdiction may refuse to make an order under this Act, and in such case no appeal shall lie from the decision of the court of summary jurisdiction: Provided always, that the High Court or a judge thereof shall have power by order in any proceeding in the High Court relating to or comprising the same subject matter as the application so refused as aforesaid, or any part thereof, to direct the court of summary jurisdiction to re-hear and determine the same. payment of money. S. 10. Court may refuse an order in cases more fit for the High Court.

11. Save as is hereinbefore provided, an appeal shall lie from any order or the refusal of any order by a court of summary jurisdiction under this Act to the Probate, Divorce, and Admiralty Division of the High Court of Justice. Rules of Court may from time to time be made regulating the practice and procedure in such appeals. And, until altered or repealed, any rules already made as to appeals under section four of the Matrimonial Causes Act, 1878, shall apply to appeals under this Act. S. 11. Appeal.

12. The Acts specified in the schedule to this Act are hereby repealed to the extent therein mentioned, except so far as they apply to Ireland. S. 12. Repeal of Acts.

SCHEDULE.

ENACTMENTS REPEALED.

Year and Chapter.	Title or Short Title.	Extent of Repeal.
41 & 42 Vict. c. 19	Matrimonial Causes Act, 1878	Section 4.
49 & 50 Vict. c. 52	Married Women (Maintenance in Case of Desertion) Act, 1886.	The whole Act.

58 & 59 Vict.
c. 39.

Protection for
wife or hus-
band of
habitual
drunkard.
Licensing
Act, 1902
(2 Edw. 7,
c. 28), s. 5,
sub-ss. 1, 2.

Habitual
drunkard,
what is.

Appeal.

Decisions
under.

Persistent
cruelty.
Effect of s. 4
retrospective.

The Licensing Act, 1902 (2 Edw. 7, c. 28), by section 5, sub-section 1, extends the provisions of the Summary Jurisdiction (Married Women) Act, 1895, to all cases where the husband of a married woman is an habitual drunkard as defined by section 3 of the Habitual Drunkards Act, 1879.

And by section 5, sub-section 2, all the provisions of section 5 of the Summary Jurisdiction (Married Women) Act, 1895, are re-enacted for the protection of a "*married man*" whose wife is an habitual drunkard as defined by section 3 of the Habitual Drunkards Act, 1879.

Where evidence was given that a husband was "constantly drinking," "very rarely sober," and that he assaulted his wife and threatened other people, the Court held that the justices were right in holding that he was "an habitual drunkard" within the meaning of the Act (*d*).

The only appeal from an original order under the Summary Jurisdiction (Married Women) Act, 1895, is to the Divisional Court of the Probate, Divorce and Admiralty Division (*e*); but an appeal lies by way of special case to the King's Bench Division, from a committal under a warrant, made on an information or complaint that weekly payments are in arrear, by virtue of section 9 of this Act, and section 4 of the Bastardy Law Amendment Act, 1872 (*f*).

The following are the principal reported decisions of the Divisional Court of the Probate, Divorce and Admiralty Division as to the above statute.

Section 4 of this Act is retrospective in its operation, and applies to acts of cruelty committed before the Act came into force (*g*).

(*d*) *Robson v. Robson* (1904),
68 J. P. 416.

(*e*) *Manders v. Manders*,
(1897) 1 Q. B. 474; 66 L. J., Q.
B. 296.

(*f*) *Ruther v. Ruther*, (1903)
2 K. B. 270; 72 L. J., K. B.

826.
(*g*) *Lane v. Lane*, (1896) P.
133; 65 L. J. P. 63; 74 L. T. 557.

Upon a summons for maintenance under this Act, the Court must be satisfied that the husband is in receipt of actual earnings or has the capability of earning a livelihood. Evidence of means cannot be entirely dispensed with (*h*).

58 & 59 Vict.
c. 39. —

Court must be satisfied husband has means or capability of earning means.

Amount of allowance to wife.

Although there is no hard and fast rule as to the amount of allowance to be made to a wife, the justices will do well to follow the practice of the Divorce Court in suits for judicial separation, and, when there are no children, allow the wife one-third of the joint income (*i*).

In computing the amount of such allowance, it is the duty of the justices to inquire into the joint means of the husband and wife, and in doing so they ought to take into account a voluntary allowance paid to the wife by a person other than her husband (*k*).

They are also entitled to take into consideration the existence of any infant children by a former marriage which the wife may have to support, a husband being liable for the maintenance of his step children (*l*).

By section 5 (a), under which an order "shall have the effect *in all respects* of a decree of judicial separation on the ground of cruelty," it was thought by many practitioners that when a magistrate under this section gave a woman a separation order that she was in the same position as she would have been had she obtained a decree of judicial separation from the Divorce Court, and that if she could afterwards prove adultery she would then be able to apply to the Divorce Court and obtain a dissolution of her marriage.

(*h*) *Earnshaw v. Earnshaw*, 241; 70 L. J. P. 94; 84 L. T. 573; *Wileox v. Wileox* (1902), 66 J. P. 166, where the Court also held that the maintenance order should, on its face, recite the conviction of the husband.

(*i*) *Cobb v. Cobb* (No. 1), (1900) P. 294; 69 L. J. P. 125; 83 L. T. 716. See also *Barker v. Barker* (1905), 74 L. J. P. 74. (*l*) *Hill v. Hill*, (1902) P. 140; 71 L. J. P. 81; 86 L. T. 597.

(*k*) *Nott v. Nott*, (1901) P.

58 & 59 Vict.
c. 39.

It was not until 1905 that the question was first raised in *Smith v. Smith (m)*. The parties were married on Nov. 25th, 1896, and the husband deserted the wife in Jan., 1897. On March 5th, 1897, the wife obtained a separation order and allowance. In Feb., 1905, the husband wrote admitting adultery, and the wife petitioned for a divorce. When the case came before Mr. Justice Bargrave Deane on 22nd June, 1905, he expressed a doubt as to whether the necessary period of two years for statutory desertion under the Matrimonial Causes Act, 1857, had been proved, but after consultation with the President on July 3rd he granted a decree *nisi*.

Then on the 19th Dec., 1905, was heard the case of *Dodd v. Dodd (n)*. The parties were married in 1891, and the wife left the husband in August, 1896, owing to his drunkenness and neglect to provide maintenance for her and her child. On Sept. 9th, 1896, the wife obtained an order for separation and maintenance under the Summary Jurisdiction Act, 1895. The husband committed adultery in 1905, whereupon the wife petitioned for a divorce on the grounds of adultery and desertion. On the hearing, the papers were sent to the King's Proctor and the case was argued by the Attorney-General on the 19th March, 1906, and on the 27th April the President delivered judgment. He dismissed the petition [disagreeing with *Smith v. Smith*], holding that a wife who takes a separation order under the Summary Jurisdiction Act, 1895, within two years from the time when desertion commenced cannot subsequently, after the expiration of the two years, allege that her husband has deserted her for the space of two years and upwards without reasonable excuse so as to constitute the offence contemplated by the Matrimonial Causes Act, 1857.

The next case was *Failes v. Failes (o)*. The parties

(m) (1905) P. 249; 74 L. J. P. 49; 94 L. T. 709.	
P. 113; 93 L. T. 457.	(o) (1906) P. 326; 75 L. J.
(n) (1906) P. 189; 75 L. J. P. 95; 95 L. T. 547.	

were married in 1885. Early in 1901 the husband left his wife, but returned after an interval of some weeks. A few months later he left her again and never returned. In May, being destitute, she applied to the police court, obtaining a separation order and an order for 10s. a week. This order was not complied with, and the husband was found to be living in adultery. Mr. Justice Bucknill, approving *Smith v. Smith* and distinguishing *Dodd v. Dodd*, granted the wife's petition for divorce.

58 & 59 Vict.
c. 39.

The last case of this series is *Harriman v. Harriman* (p). In July, 1905, the husband deserted the wife, who in March, 1906, applied to the magistrate, who granted a separation order and a weekly allowance. In 1907 the husband committed adultery, and the wife petitioned for divorce. The case came before Mr. Justice Bucknill, who dismissed the petition, thereby approving *Dodd v. Dodd* and overruling *Smith v. Smith* and *Failes v. Failes*. The petitioner appealed, and the case was heard before the full Court. Mr. Justice Bucknill's decision was upheld. Where, therefore, a married woman applies for an order under section 5 of the Summary Jurisdiction (Married Women) Act, 1895, upon the ground of desertion only, a non-cohabitation clause is, in general, an inappropriate remedy and should not be inserted in the order.

By section 8, "All applications under this Act shall be made in accordance with the Summary Jurisdiction Acts."

By the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), section 11, ". . . in all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time

Summary
Jurisdiction
Act, 1848
(11 & 12 Vict.
c. 43), s. 11.

58 & 59 Vict.
c. 39.

when the matter of such complaint or information respectively arose."

Desertion
continuous
act.

But desertion is a continuing act, and an application by a wife need not be made within six months of the commencement of the desertion (*q*).

In other cases
applications
must be made
in every case
within six
months.

On the other hand, persistent cruelty by a husband and wilful neglect by him to provide reasonable maintenance are not continuing offences, and the complaint must in each case be made within six calendar months of the offence (*r*).

Cohabitation,
what
amounts to.

Cohabitation may exist between married persons without their actually living under the same roof, and if a husband habitually visits his wife and has sexual intercourse with her he may be as much guilty of desertion, if he withdraws from her, as if they had been actually residing together (*s*). A wife had been living apart from her husband for some time, and on June 23rd, 1899, she called upon him and asked him to take her back, which he refused to do. The justices refused to hear evidence of anything previous to June 23rd, 1899, and held that the husband's refusal on that date to take his wife back amounted to desertion on or since that date. The Court held that the mere fact that the wife had on a certain day asked her husband to take her back, and that he had refused to do so, did not *per se* amount to legal desertion on or since that date; that the justices were wrong in refusing to hear evidence of what occurred before that date, and that the case must be remitted (*t*).

(*q*) *Heard v. Heard*, (1896) P. 188; 65 L. J. P. 111.

(*r*) *Ellis v. Ellis*, (1896) P. 251; 65 L. J. P. 124; 75 L. T. 390. See also *Medway v. Medway*, (1900) P. 141; 69 L. J. P. 56; 82 L. T. 627.

(*s*) *Bradshaw v. Bradshaw*, (1897) P. 24; 66 L. J. P. 31; 75 L. T. 391; followed in *Huxtable*

v. Huxtable (1899), 68 L. J. P. 83. See also *Brown v. Brown* (1898), 79 L. T. 102.

(*t*) *Wassell v. Wassell* (1899), 68 L. J. P. 127; 81 L. T. 496. See also *Charter v. Charter* (1901), 84 L. T. 272; and see further on this point, *Snape v. Snape* (1900), 64 J. P. 793.

A deed of separation is a bar to the jurisdiction of the justices on the ground of desertion, even though the husband may have failed entirely to pay an allowance (which he had covenanted under such deed to pay to his wife) for more than two years at the date on which she takes out a summons against him under the Act (*u*).

58 & 59 Vict.
c. 39.

Deed of
separation.
Subsequent
summons for
desertion.

A husband who is summoned before justices for desertion should have the opportunity afforded him of proving that he had reasonable cause or excuse for the separation (*x*).

Desertion.
Reasonable
excuse by
husband.

Apart from any special provision in the Act, a return by a wife to cohabitation pending the adjournment of a summons for desertion and before an order is made, puts an end to the cause of complaint, and no order can subsequently be made upon the summons (*y*).

Wife
returning to
cohabitation
pending
proceedings.

In administering the Act, courts of summary jurisdiction should be careful not to interfere too much in married life.

Duty of
justices.

Upon appeals under this Act, the Divisional Court will not reverse a finding of fact, unless it be shown that the court of summary jurisdiction was clearly wrong in the conclusion at which it arrived (*z*).

Appeals on
findings of
fact.

The justices' clerks should take notes of the evidence, and of the reasons of the justices for their decision (*a*); and if the clerk with the consent of the parties allows a

Duty of jus-
tices' clerks.

(*u*) *Piper v. Piper*, (1902) P. 198; 71 L. J. P. 100; 87 L. T. 150; *Rowlands v. Rowlands* (1902), 86 L. T. 125.

(*x*) *Frowd v. Frowd*, (1904) P. 177; 73 L. J. P. 60; 90 L. T. 175.

(*y*) *Williams v. Williams*, (1904) P. 145; 73 L. J. P. 31; 90 L. T. 174.

(*z*) *Harling v. Harling*, W. N. (1896) 28; 31 L. J. Notes, 160; 74 L. T. 559.

(*a*) *Harling v. Harling*, *supra*; *Jagger v. Jagger*, W. N. (1896) 63; 31 L. J. Notes, 355; *Robinson v. Robinson*, (1898) P. 153; 67 L. J. P. 77; 78 L. T. 292; *Walton v. Walton*, (1900) P. 147; 69 L. J. P. 54; 82 L. T. 627; *Cobb v. Cobb* (No. 2), (1900) P. 145; 69 L. J. P. 52; 82 L. T. 626. See also *Barker v. Barker* (1905), 74 L. J. P. 74; *Wenham v. Wenham* (1906), 95 L. T. 548.

58 & 59 Vict.
c. 39.

shorthand note to be taken in the place of his ordinary note, he must certify the transcript of such note as correct (*b*).

Fresh
evidence,
what is.

"Fresh evidence," within the meaning of section 7, is evidence which could not have been made available at the date of the order, or else it must relate to something which has happened since the date of the order. But in a case where the husband was so ill at the time of the application to the justices that he could not instruct his solicitor or give the names of his witnesses, and the justices refused an adjournment, the Court, on appeal, after his partial recovery, ordered the case to be remitted to the justices, for re-hearing *ab initio* (*c*).

Before Divi-
sional Court.

Fresh evidence will not, as a rule, be received by a Divisional Court hearing appeals from justices under this Act (*d*).

Summons out
of time.

Jurisdiction
of justices.

Where a summons is withdrawn at the hearing, the complaint on which it is founded comes to an end, and the justices have no jurisdiction to issue a fresh summons founded on the same ground of complaint (*e*).

See further on the subject of this chapter, Part II., tit. "Summary Jurisdiction (Married Women) Act, 1895" (p. 511).

(*b*) *Royle v. Royle*, (1909) P.
24; 78 L. J. P. 34; 99 L. T.
882.

(*c*) *Johnson v. Johnson*, (1900)
P. 19; 69 L. J. P. 13; 81 L. T.
791. See also *Wrightman v.*
Wrightman (1906), 94 L. T. 620.

(*d*) *Snape v. Snape* (1898), 62
J. P. 153.

(*e*) *Pickavance v. Pickavance*,
(1901) P. 60; 70 L. J. P. 14; 84
L. T. 62; *Stokes v. Stokes*, (1911)
P. 195; 105 L. T. 416.

CHAPTER XV.

NEW TRIAL AND RE-HEARING.

THE term "new trial" is used when the case has been tried by a jury; "re-hearing" when the case has been heard before the Court itself.

Distinction
in terms.

Since the passing of the Supreme Court of Judicature Act, 1890, every motion for a new trial in a matrimonial cause must be made in the first instance to the Court of Appeal.

Supreme
Court of
Judicature
Act, 1890
(53 & 54 Vict.
c. 44), s. 1.

It was, however, decided by the Court of Appeal in 1897 that, notwithstanding the provisions of the above statute, a motion for the re-hearing of a divorce case must be made, in the first instance, to a Divisional Court of the Probate, Divorce and Admiralty Division (a).

Motions for
re-hearing.

A new trial will not be granted on the ground of the verdict being against the weight of evidence, simply because the judge who tried the case might have arrived at an opposite conclusion, or because the judge did not give as much weight to some parts of the evidence as they deserved. Before it will grant a new trial on this ground, the Court must be satisfied that there has been error or miscarriage of justice (b).

Verdict
against
weight of
evidence.
Must be
miscarriage
of justice for
new trial,

On the other hand, the Court may order a new trial

but may be
new trial

(a) *Smith v. Smith* (J. M. Nowers intervener), (1897) P. 293; 66 L. J. P. 151; 77 L. T. 206. See also *Watson v. Watson* (1903), 89 L. T. 78; *Holden v. Holden and Pearson* (1902), 102 L. T. 398.

L. T. 454; *Miller v. Miller and Hicks* (1862), 2 S. & T. 427; 31 L. J. P. 73; 5 L. T. 850; *Codrington v. Codrington and Anderson* (1865), 4 S. & T. 63; 34 L. J. P. 60; *Gethin v. Gethin* (Queen's Proctor intervening) (1862), 2 S. & T. 560; 31 L. J. P. 57; 5 L. T. 721.

(b) *Scott v. Scott* (1863), 3 S. & T. 320; 33 L. J. P. 1; 9

New trial, &c. on the ground that the verdict is against the weight of evidence, although the judge who tried the case may be satisfied with the verdict (*c*).

Re-hearing as to some of the charges only granted. A wife having charged her husband with cruelty by the communication of disease, and also by personal violence, the Court found, on the evidence, that the charge of communication of disease was not proved, but that the charge of personal violence was proved: on the application of the husband the Court, on the ground of surprise, granted a re-hearing of the charge of personal violence, but refused a re-hearing of the charge of infection (*d*).

Jury disagreeing as to some charges. Verdict for petitioner as to rest. In a suit for dissolution of marriage, brought by the wife, the jury found a verdict for the petitioner on a charge of cruelty, but were unable to agree to a verdict on a charge of adultery; the Court refused to allow a second trial, on the question of adultery only, but gave the petitioner the alternative, either to have a rule calling upon the respondent to show cause why a decree of judicial separation should not be made, on the ground of his cruelty, or to set down all the questions at issue for a second trial (*e*).

Mat. C. Act, 1857, s. 31. It is no ground for a new trial that the jury has disagreed upon some issue of fact raised by a plea to the discretion of the Court under section 31 of the Matrimonial Causes Act, 1857. The determination of such issues rests solely with the Court, and the verdict of the jury on such an issue is asked merely to assist the Court in forming its opinion (*f*).

Issues for Court.

(*c*) *Stone v. Stone and Appleton* (1864), 3 S. & T. 608; 34 L. J. P. 33.

(*d*) *Lee v. Lee* (1872), L. R., 2 P. & D. 409; 41 L. J. P. 85; 27 L. T. 324.

(*e*) *Godrich v. Godrich* (1872), L. R., 2 P. & D. 392; 41 L. J. P. 45; 26 L. T. 855; and see further as to the course pursued when the

Court is dissatisfied with the verdict as to some of the issues, *Fitzgerald v. Fitzgerald* (1863), 3 S. & T. 400; 10 L. T. 510; *Cartledge v. Cartledge*, *Ib.* 406; 32 L. J. P. 126; 8 L. T. 334.

(*f*) *Narracott v. Narracott and Hesketh* (1864), 3 S. & T. 408; 33 L. J. P. 132.

An inconsistent verdict is not a ground for a new trial; unless it prevents the Court from ascertaining the substantial opinion of the jury (*g*). New trial, &c. Inconsistent verdict.

Where a respondent was persuaded by his solicitor to withhold evidence which would have gone to clear his character as a gentleman and a man of honour, but would not otherwise have affected the questions at issue, the Court refused a new trial (*h*). Mistake in evidence not affecting material issues.

On the other hand, where a witness made a mistake in a date, which, if correctly given, might have affected the verdict, the Court granted a new trial (*i*). Where material issue affected.

The Court will grant a new trial, where fresh evidence has been obtained since the original trial, if it is of opinion that such evidence would lead to a different verdict (*k*). Fresh evidence.

When a verdict has been found for the respondent the Court will not dismiss the petition until the time allowed for moving a new trial has elapsed (*l*); for the controversy between the parties is not ended until that period has elapsed (*m*). Verdict for respondent.

If a verdict has been found against two co-respondents in a suit for dissolution of marriage, and the Court afterwards, on the application of one of them, grants a new trial, on the ground that a verdict against him was contrary to the weight of the evidence, there must be a new trial as to both (*n*). Verdict against two co-respondents. New trial on application of one.

Where a jury found that the respondent had committed Issues found

(*g*) *Ellyatt v. Ellyatt, Taylor and Halse* (1864), 3 S. & T. 503. (1861), 2 S. & T. 513; 30 L. J. P. 198; 5 L. T. 120 (unless by consent of all parties: *Seddon v. Seddon and Doyle* (1862), 2 S. & T. 640; 31 L. J. P. 31).

(*h*) *Hill v. Hill* (1861), 2 S. & T. 407; 31 L. J. P. 193; 5 L. T. 363.

(*i*) *Jago v. Jago and Graham* (1862), 3 S. & T. 103; 31 L. J. P. 101; 7 L. T. 645.

(*k*) *Taylor v. Taylor and Darg* (1899), 68 L. J. P. 116; 81 L. T. 494.

(*l*) *Hitchcock v. Hitchcock* D.M.C.

(*m*) *Goderich v. Goderich, Lara Forder and Kelsey* (1868), 19 L. T. 611.

(*n*) *Walker v. Walker, Nicoll and Craig* (1861), 4 S. & T. 264; 31 L. J. P. 26.

New trial, &c. adultery with the co-respondent, and that the petitioner against co-respondent and also petitioner. had committed adultery also, but they declined to say with whom, or in what place, or whether or not it was with the consent of the respondent, and the co-respondent obtained an order for a new trial; the Court signified that the petitioner might also have a new trial on the question of his adultery (o).

Notice of application for new trial no ground for suspending decree nisi. It is no ground for suspending the decree *nisi*, after a verdict for the petitioner in a suit for dissolution of marriage, that the respondent has given notice of an application for a new trial (p).

Second decree nisi made absolute forthwith. Where the Court had pronounced a decree *nisi* on a first trial, and after a new trial had done so again for the second time, and the Queen's Proctor stated that he had no intention of intervening, it made the decree absolute, without waiting for the expiration of six months from the date of the second trial (q).

Petition by wife. A wife in 1892 petitioned for a judicial separation on the ground of her husband's adultery. The husband denied the charge, and also alleged that at the time of the marriage the petitioner had a husband living. At the trial in 1895 the jury found that the husband had committed adultery, and that at the time of the marriage the first husband was dead, and a decree for judicial separation was pronounced. In September, 1895, the first husband, who had not been heard of since 1858, returned to England. In October, 1895, the second husband presented a petition for a declaration of nullity of marriage. The wife pleaded the verdict and decree in the former suit as an estoppel. At the trial the identity of the first husband was established, but the Court held that a decree of nullity

(o) *Barnes v. Barnes and Beaumont* (1868), L. R., 1 P. & D. 572; 38 L. J. P. 9; 19 L. T. 826.

S. & T. 212; 32 L. J. P. 117; 9 L. T. 24.

(q) *Sheffield v. Sheffield and Paice* (1881), 29 W. R. 523.

(p) *Stone v. Stone* (1863), 3

could not be pronounced, whilst the verdict and judgment in the first trial remained unimpeached. New trial, &c.

Under these circumstances the Court of Appeal enlarged the time in which the second husband might apply for a new trial, but only on the terms of the applicant securing to the respondent, during their joint lives, an allowance for her maintenance, the amount of which was fixed by the Court (*r*). Time for applying for, enlarged.

A party moving in the Court of Appeal for a new trial where a divorce cause has been tried by a jury is not required to give security for costs (*s*). Motion for new trial. Security for costs.

An appeal without leave lies to the House of Lords, from an order of the Court of Appeal for a new trial in a divorce cause (*t*). Appeal to House of Lords.

See further on the subject of this chapter, "Costs," Chap. XVI. (p. 228), and Part II., "New Trial and Re-hearing" (p. 525).

(*r*) *Wilkins v. Wilkins*, (1896) P. 108; 65 L. J. P. 55; 74 L. T. 62.

(*s*) *Rickaby v. Rickaby and Swift*, (1901) P. 134; 70 L. J. P. 24; 84 L. T. 182; following

Heckscher v. Crosley and Another, (1891) 1 Q. B. 224; 60 L. J., Q. B. 75.

(*t*) *Butchart v. Butchart and Hill*, (1901) A. C. 266; 70 L. J. P. 29; 84 L. T. 209.

CHAPTER XVI.

COSTS.

General
observations.
Discretion.

IN every case, except where it may be still hampered by the practice of the Ecclesiastical Courts, costs are in the absolute discretion of the Court, and nowadays there is scarcely any order as to costs which the special circumstances of any case may demand that the Court cannot and does not make.

Wife's costs.

A wife, unless her solicitor has not taken up her case *bonâ fide*, whether innocent or guilty, is nearly always allowed a certain amount of costs in the Divorce Court, for which the husband is primarily liable (*a*), unless she is shown to have separate estate.

Reason of
rule as to
wife's costs.

The reason for this rule is that it is not considered fair either that the wife should be left without the means of putting her case fairly before the Court, or that a practitioner should run the risk of losing the proper remuneration for his labours if he takes up a case which he honestly believes to be genuine, but which may after all turn out to be unfounded.

Co-respon-
dents.

As a general rule, a co-respondent found to have committed adultery with the respondent is condemned in costs if there is evidence that he knew she was a married woman, but not otherwise.

The King's Proctor and other interveners are condemned in costs when the Court is of opinion that their intervention was uncalled for.

(*a*) See Part II., tit. "Costs" (p. 540).

Where the wife succeeds, costs follow the decree as a matter of course if the Court gives no direction as to them (*b*). Where the wife fails in her suit, she gets the amount fixed by the registrar at the time of setting down for trial (*c*), and no more, unless the Court under the special circumstances of the case thinks fit to make some special order (*d*).

Wife's costs.
Against husband.

But in *Robertson v. Robertson* (*e*) it was decided by the Court of Appeal that in a divorce suit the costs of the wife payable by the husband are not limited to the amount paid into Court or secured, so that the Court may, if it so please, order costs to the full amount to be paid even to a guilty wife.

Not limited to amount fixed by registrar.

Where the husband was found guilty of cruelty, and both husband and wife were found guilty of adultery, the Court of Appeal reversed a decree for judicial separation, but gave the wife her costs, notwithstanding her adultery, both in the Court below and on the appeal (*f*).

Recent decision as to.
Otway v. Otway.

Where a husband had to pay certain costs of an unsuccessful suit for nullity brought against him by his wife, but the wife subsequently obtained a divorce from him, he was allowed to deduct when paying his wife's costs in the second suit the amount which he had paid on account of her costs in the suit for nullity (*g*).

Full costs allowed to wife though guilty of adultery.

Two suits, costs of first suit deducted from second.

The rule as to the wife's costs applies equally to suits for nullity of marriage (*h*).

Suits for nullity.

(*b*) See *Dixon v. Dixon* (1859), 28 L. J. P. 96; *Kaye v. Kaye* (1858), 4 S. & T. 239.

Major, Child and Rabett (1882), 7 P. D. 84; 51 L. J. P. 31; 46 L. T. 696.

(*c*) See Part II., tit. "Costs" (p. 540).

(*f*) *Otway v. Otway, Otway v. Otway and Hoffer* (1888), 13 P. D. 141; 57 L. J. P. 81; 59 L. T. 153.

(*d*) But see on this point *Keats v. Keats and Montezuma* (1859), 1 S. & T. 324; 28 L. J. P. 57; *Rolt v. Rolt* (1864), 3 S. & T. 604; 3 L. J. P. 51.

(*g*) *Ditchfield v. Ditchfield* (1869), L. R., 1 P. & D. 729; 38 L. J. P. 51; 20 L. T. 1015.

(*e*) (1881), 6 P. D. 119; 51 L. J. P. 5; 45 L. T. 237. But see on this point *Smith v. Smith*,

(*h*) *M. (falsely called C.) v. C.* (1872), L. R., 2 P. & D. 414; 41

Wife's costs.

Solicitor
guilty of
misconduct.

When the husband has been ordered by the registrar to give security for his wife's costs up to a certain amount, costs to that amount are always allowed her, whether she be successful or not, unless her solicitor has been guilty of some misconduct, or has instituted the suit knowing that it was without reasonable ground (*i*).

Ecclesiastical
Courts, wife
with separate
estate.

In the Ecclesiastical Courts if a wife was possessed of separate estate, the husband was not held liable for her costs where she was unsuccessful, and this rule has been followed in cases of judicial separation in the Divorce Court (*k*).

Varying
settlement,
costs.

The Court refused to make any order as to costs in varying a settlement in a case where it extinguished the husband's interest in the wife's money, and she had the whole income (*l*).

Wife peti-
tioner in
nullity suit—
security for
costs.

The Court has held that it has power to order a wife petitioner in a nullity suit to give security for costs where she has separate estate (*m*).

Examples of
cases where
wife con-
demned in
costs.

Where a petitioner for judicial separation desired to substitute a petition for dissolution of marriage, she was only allowed to do so on paying the costs of the suit up to the time of the motion (*n*).

Judicial
separation.

Restitution
of conjugal
rights.

Where a wife evaded service of a decree for restitution by remaining out of the jurisdiction, the Court, on being satisfied that she had a sufficient separate income, condemned her in the costs of the proceedings (*o*).

In suit for restitution, the Court will decline to make

L. J. P. 37; 26 L. T. 321. See also *Jackson (otherwise Macfarlane) v. Jackson*, (1908) P. 308; 77 L. J. P. 147.

(*i*) *Flower v. Flower* (1873), L. R., 3 P. & D. 132; 42 L. J. P. 45; 29 L. T. 253. See also *Kay v. Kay*, (1904) P. 382; 73 L. J. P. 108; 91 L. T. 360.

(*k*) *Heal v. Heal* (1867),

L. R., 1 P. & D. 300; 36 L. J. P. 62.

(*l*) *Boynton v. Boynton* (1861), 30 L. J. P. 156; 2 S. & T. 275; 4 L. T. 258.

(*m*) *De B. v. De B.* (1875), 44 L. J. P. 41; 33 L. T. 263.

(*n*) *Lewis v. Lewis* (1860), 29 L. J. P. 123.

(*o*) *Miller v. Miller* (1869), L. R., 2 P. & D. 13.

the usual order for wife's costs when the grounds of the litigation were unreasonable (*p*). Wife's costs.
—

Where a respondent and co-respondent both appeared and filed answers containing countercharges, but offered no evidence in support of them at the hearing, and the respondent had a large separate income, the Court ordered her to pay the costs of the proceedings, and the co-respondent to pay such costs as had been incurred by the issues he had raised in his answer (*q*). Dissolution
of marriage.

Where an order for costs was made against the co-respondent, and it was proved that the wife was possessed of separate estate, an order was also made against her for the costs of the suit (*r*). Wife and
co-respondent
both con-
demned in
costs.

The Court need not inquire whether at the time the wife committed the wrongful act she had any separate estate, but only whether she has or has not at the time when it has to arrive at a decision (*s*). Court may
condemn wife
in costs with-
out inquiring
whether she
has separate
estate.

Where in a suit for nullity by a next of kin on the ground of the woman's insanity at the time of the marriage, the petitioner delayed three years in instituting the suit, and the respondent was put to much expense in the meantime in maintaining the lunatic, the Court refused to make any order as to costs (*t*). Petition by
next of kin
for nullity.

Where a wife petitioner returned to her husband pending suit, the Court would only allow the petition to be dismissed on the husband's application on the payment of her taxed costs (*u*). Wife re-
turning to
cohabitation

The Court made an order for the taxation and payment of the wife's costs in a matrimonial suit against the Husband
apparently
unable to
pay costs.

(*p*) *Beer v. Beer* (1906), 94 L. T. 704. and Others (1888), 59 L. T. 523.

(*q*) *Milne v. Milne and Fowler* (1871), L. R., 2 P. & D. 202. (*t*) *Hancock (falsely called Peaty) v. Peaty* (1867), L. R., 1 P. & D. 335; 36 L. J. P. 57.

(*r*) *Millward v. Millward and Andrews* (1887), 57 L. T. 569. (*u*) *Cooper v. Cooper* (1864), 3 S. & T. 392; 33 L. J. P. 71;

(*s*) *Hyde v. Hyde, Fellgate* 10 L. T. 275.

Wife's costs. husband, notwithstanding his apparent inability to pay them (*x*).

Wife unsuccessful in suit but successful in counter-charges. Where a guilty wife succeeded in establishing counter-charges against her husband, the Court gave her costs (*y*).

Wife successful. Where a wife was successful she was held entitled to the payment of her full costs, notwithstanding that a motion for a new trial and a bill of exceptions were pending (*z*).

Mat. C. Acts, 1857, 1858, and Rules of 1866. The provisions relating to costs contained in the Matrimonial Causes Acts, 1857 and 1858, and the Rules of Court, 1866, made under those Acts, provide a remedy for the recovery of costs concurrently with, and not in substitution for, the provisions of the common law.

Husband's liability at common law. At common law a husband is liable to an action for costs, as between solicitor and client, necessarily incurred by his wife in filing a petition for a judicial separation, although the petition is not proceeded with, and the course prescribed by the practice of the Divorce Court for obtaining the wife's costs has not been pursued (*a*); and he is also liable for all costs, as between solicitor and client, reasonably incurred by her in divorce proceedings, including all extra costs over and above those allowed on taxation in the Divorce Court (*b*).

As to condemning wife in costs of husband. The Court may condemn a wife to pay her husband's costs in any proceeding in the Divorce Court, though it will not do so if it would thereby deprive her of the means of subsistence (*c*).

(*x*) *Ward v. Ward* (1859), 1 S. & T. 484; 29 L. J. P. 17.

(*y*) *Caldecott v. Caldecott and Cartwright* (1873), 29 L. T. 699.

(*z*) *Cooke v. Cooke and Allen* (1864), 3 S. & T. 603; 34 L. J. P. 15; *Chetwynd v. Chetwynd* (1865), 4 S. & T. 108; 34 L. J. P. 65. See also *Burroughs v. Burroughs*, *Burroughs v. Bur-*

roughs and Silcock (1862), 31 L. J. P. 124.

(*a*) *Rice v. Shepherd* (1862), 12 C. B., N. S. 332; 6 L. T. 432.

(*b*) *Ottaway v. Hamilton* (1878), 3 C. P. D. 393; 47 L. J., C. P. 725; 38 L. T. 925.

(*c*) *Carstairs v. Carstairs, Dickenson and Others* (1864), 3 S. & T. 538; 33 L. J. P. 170;

The costs of an unfounded defence will be dis- allowed (*d*). Wife's costs.

A respondent and co-respondent denied adultery, and the respondent further charged the petitioner with adultery. It appeared that this latter charge was substantially the joint defence of the respondent and the co-respondent, and the jury found that neither respondent, co-respondent nor petitioner had been guilty of adultery. The Court allowed the respondent the whole of her costs in supporting the first issue, although they exceeded the sum deposited in the registry, but held that she was entitled only to a moiety of the costs incurred with respect to the second (*e*). Unfounded defence. Counter-charges against husband by respondent, joint defence of respondent and co-respondent.

Where a new trial is granted on application of the wife, the Court will not usually impose upon her the terms of payment of costs, if she has no means, but the husband must pay the costs of both parties (*f*). New trial.

In a very early case the Court refused to allow the wife's costs of appeal to be taxed against her husband (*g*); also the costs of an attempt on her part to prevent a decree *nisi* pronounced against her from being made absolute (*h*). So, where she applies to have the cause tried by a special jury, the Court sometimes refuses her the costs of the special jury (*i*). Where a respondent, having obtained an order upon the petitioner to pay to her or her attorney a certain amount of costs, endeavoured to enforce such order by a writ of *fi. fa.* but failed in recovering them, the Court ordered the proceedings in the divorce suit to be Appeal. Special jury. Staying proceedings.

10 L. T. 696. See also *Clark v. (1863), 3 S. & T. 214; 32 L. J. Clark and Saldji, (1906) P. 331; P. 127; 9 L. T. 118.*

76 L. J. P. 16; 95 L. T. 550. (*g*) *Thompson v. Thompson and Sturmffells (1861), 2 S. & T. 404; 31 L. J. P. 213.*

(*d*) *Clark v. Clark, Perrin and Cumins (1865), 4 S. & T. 111; 34 L. J. P. 71; 12 L. T. 148.* (*h*) *Stoate v. Stoate (1861), 2 S. & T. 384; 30 L. J. P. 173; 5 L. T. 138.*

(*e*) *Burroughs v. Burroughs, Burroughs v. Burroughs and Silcock (1862), 31 L. J. P. 124.* (*i*) *Scott v. Scott (1862), 32*

(*f*) *Nicholson v. Nicholson L. J. P. 40.*

Wife's costs. — stayed until the costs had been paid by the petitioner, but refused to extend the order to the expenses incurred in the suing out and execution of the writ of *fi. fa. (k)*.

Second suit on different grounds.

In an early case in the Divorce Court where a petitioner, having failed in a suit for dissolution on the ground of his wife's adultery with A., instituted another suit of a similar nature on the ground of her adultery with B., the Court held the causes of action to be different, and refused an application to stay proceedings in the second suit until the costs of the former should have been paid (*l*); but this is no longer good law, for the Court of Appeal, in a case where the jury had disagreed, refused to allow the husband to proceed with a re-trial until he had paid the balance of the wife's costs and given security for her costs in the new trial (*m*).

The Court of Appeal also in a case where a husband's petition had been dismissed with costs, which costs had been taxed and remained partly unpaid, on the husband filing a second petition alleging adultery with different co-respondents, held that all proceedings should be stayed until the husband had paid all the wife's costs in the first suit (*n*).

Application to condemn wife in costs.

Notice.

The Court declined to entertain an application to condemn a wife who had not appeared to defend a divorce suit in costs until she had received notice of such application (*o*).

Abortive trial.

Where a jury disagreed, the Court gave the wife

(*k*) *Keane v. Keane* (1873), L. R., 3 P. & D. 52; 42 L. J. P. 12; 27 L. T. 768.

(*l*) *Yeatman v. Yeatman and Rummell* (1869), 39 L. J. P. 37; 21 L. T. 647.

(*m*) *Kemp-Welch v. Kemp-*

Welch and Crymes, (1910) P. 233, C. A.

(*n*) *Sanders v. Sanders*, (1911) P. 101, C. A.; 104 L. T. 231; 80 L. J. P. 44.

(*o*) *Field v. Field and Denton* (1887), 13 P. D. 23; 58 L. T. 90.

her full costs over and above the amount deposited in Court (*p*).

Where a wife petitioner in a divorce suit obtained a verdict from a jury on all the issues, the Court refused to allow her the costs of certain charges of cruelty made against her husband, which it was of opinion she had condoned (*q*).

To entitle an unsuccessful wife to secured costs it is essential that they should be the result of substantial allegations and reasonably incurred. Costs of allegations which have no prospect of success are incurred at the risk of the party making them (*r*).

In a case of judicial separation the Court, whilst expressing a strong opinion that the wife's charges against her husband were of a trumpery character, refused to deprive her of the usual order, although she had a small separate estate, in the absence of any suggestion of improper conduct against her solicitor (*s*).

Costs are in the discretion of the Court. And where the Court has exercised its discretion, the Court of Appeal is precluded from reviewing such decision (*t*).

The Court in a divorce suit made an order to pay and secure certain sums for the wife's costs. Subsequently the husband became entitled to a legacy. The Court granted an injunction to restrain him from receiving the legacy until the orders as to costs were complied with (*u*).

Wife's costs.

Full costs to wife.

Wife allowed part of costs only.

1904.

Costs of unfounded charges.

Usual order for wife's costs, though charges frivolous.

1892.

No appeal as to costs.

Injunction.

Costs due.

(*p*) *Hurley v. Hurley and Menzies*, (1891) P. 367; 61 L. J. P. 14; 65 L. T. 353.

(*q*) *Ash v. Ash*, (1893) P. 222; 62 L. J. P. 97; 68 L. T. 500. See also *Beer v. Beer* (1906), 94 L. T. 704.

(*r*) *Kay v. Kay*, (1904) P. 382; 73 L. J. P. 108; 91 L. T. 360.

(*s*) *Aires v. Aires* (1892), 65 L. T. 859. See also as to solici-

tor, *Rogers v. Rogers* (1865), 4 S. & T. 82; 34 L. J. P. 87; 12 L. T. 236.

(*t*) *Russell v. Russell*, (1892) P. 152; 61 L. J. P. 45; 66 L. T. 436. See also *Butler v. Butler* (1890), 15 P. D. 126; 62 L. T. 477.

(*u*) *Gillet v. Gillet* (1889), 14 P. D. 158; 58 L. J. P. 84; 61 L. T. 401; *Bullus v. Bullus* (1910), 102 L. T. 399.

Wife's costs.

Appointment
of a receiver.

Where money was due to the wife for arrears of alimony and taxed costs, and her husband had a bill of sale on his furniture, the Court, on an *ex parte* application, appointed a receiver of the amount said to be standing in the husband's name at his bank, the powers of such receiver to be limited until the next motion day, and to the amount stated in the affidavits (*x*).

Solicitor's
lien.

The rules as to a solicitor's lien are similar to those of the common law Courts (*y*).

Charge in
favour of
solicitor made
before decree
nisi on
property
comprised in
marriage
settlement.

A charge made by a respondent, before a decree *nisi* was pronounced, on his interest in the marriage settlement to secure to his solicitor his costs in a suit for dissolution of marriage was held valid (*z*).

Charging
order in
favour of
solicitor on
sum secured
to wife.

In 1888 it was held by the Court of Appeal that a gross or annual sum secured under the order of the Court to be paid by the husband under the provisions of 20 & 21 Vict. c. 85, s. 32, is "property" of the wife, and liable to be charged with her solicitor's costs within the Attorneys and Solicitors Act (*a*).

Injunction
against part-
ing with
property in
favour of
solicitor
refused.

A judicial separation having been pronounced at the suit of the wife, an interim injunction was obtained against the husband restraining him from dealing with certain of the property. Subsequently a reconciliation took place. The Court refused, on an application by the wife's solicitor, either to continue the injunction or appoint a receiver until the balance of his costs was paid (*b*).

Solicitor's
lien on money
paid in to
meet wife's
costs.

A wife, an unsuccessful respondent, moved for a new trial, and the motion was dismissed. The husband thereupon claimed to apply a sum of money he had paid in on

(*x*) *Angliss v. Angliss* (1893),
1 R. 532; 69 L. T. 462. For a
case in which the "usual order"
for the wife's costs was refused,
see *Hough v. Hough* (1894), 71
L. T. 703.

(*y*) *Bremner v. Bremner and
Brett* (1866), L. R., 1 P. & D.
954; 36 L. J. P. 11; 15 L. T.

297.

(*z*) *Wigney v. Wigney* (1882),
7 P. D. 228; 51 L. J. P. 84; 37
L. T. 129.

(*a*) *Harrison v. Harrison*
(1888), 13 P. D. 180; 58 L. J.
P. 28; 60 L. T. 39.

(*b*) *Hawes v. Hawes* (1886),
57 L. T. 374.

account of his wife's costs to the payment of his costs incurred in and about the motion for a new trial. The Court refused to deprive the wife's solicitor of the benefit of the money in Court in the absence of proof of misconduct on his part (c).

Wife's costs.
—

The following are some of the decisions on the subject of a wife's costs.

Where a petitioner obtained leave to proceed *in formâ pauperis* some time after the proceedings had been commenced, and after an order had been made upon him for payment of his wife's costs up to a certain amount, the Court ordered all the proceedings to be stayed till the order had been complied with (d).

1897.
Payment of wife's costs after order to proceed *in formâ pauperis*.

A solicitor acting for a wife is not entitled to rely on his client's instructions, but, to entitle him to look to the husband for payment of his costs, he must fairly investigate her defence, and satisfy himself as to its reasonableness (e).

Solicitor must satisfy himself as to wife's defence.

Where a husband died during proceedings for divorce, the Court made an order for the wife's costs against his executors (f).

Husband dying *pendente lite*.

Section 5 (d) of the Summary Jurisdiction (Married Women) Act, 1895, gives the justices exclusive jurisdiction over costs, and where they decline to make an order

Order for costs against his executors.
Summary jurisdiction action will not

(c) *Hall v. Hall*, (1891) P. 302; 60 L. J. P. 73; 65 L. T. 206. See further as to wife's costs, *Brown v. Brown and Robey* (1869), 21 L. T. 181; *Margetson v. Margetson* (1865), 35 L. J. P. 80, where it was held wife's solicitor cannot charge for receiving her alimony; *Morphett v. Morphett* (1869), L. R., 1 P. & D. 702; 38 L. J. P. 23; 19 L. T. 801, as to new trial on payment of wife's costs; *Allen v. Allen* (1885), 10 P. D. 187; 54 L. J.

P. 77, wife condemned in costs of motion for custody.

(d) *Joseph v. Joseph and Burnhill* (1897), 76 L. T. 236. See also *Kemp-Welch v. Kemp-Welch and Crymes*, (1910) P. 233; 79 L. J. P. 92; 102 L. T. 787.

(e) *Walker v. Walker and Lawson* (1897), 76 L. T. 234.

(f) *Cunningham v. Cunningham* (1897), 77 L. T. 405. See also *Townson v. Townson and Bucknall* (1898), 67 L. J. P. 68; 78 L. T. 54.

Wife's costs.
 ———
 lie at common
 law to recover
 wife's costs
 refused by
 justices.
 1899.
 Restitution of
 conjugal
 rights.

for costs under that section, the solicitor who acted for the wife cannot recover his costs in an action against the husband (*g*).

Where a husband and wife were living apart under a deed of separation, under which the husband covenanted to pay the wife a weekly allowance in the payment of which he had been on one occasion three days late: the Court held that this was not a sufficient breach of covenant to debar him from the right to set up the deed in answer to his wife's petition for restitution, and refused to make the usual order for the wife's costs (*h*).

1900.
 Summary
 Jurisdiction
 (Married
 Women) Act,
 1895.
 Costs of
 Appeal.

When a wife has obtained a decision in her favour from justices under the Summary Jurisdiction (Married Women) Act, 1895, she is entitled to her costs of an appeal to the Divisional Court, whether the result of such appeal be in her favour or not (*i*).

1902.
 Two trials,
 costs of.

Where a wife has made no application for security, the Court will not allow her any costs of an abortive trial, but if she succeeds on a second trial, she will (unless under special circumstances) be entitled to her full costs of both trials (*k*).

1902.
 Position of
 solicitor
 neglecting to
 get usual
 order for
 wife's costs.

If a solicitor does not follow the usual course and get an order against the husband for his costs whilst he is acting for the wife, he cannot do so after he has given notice that he has ceased to act for her. He will then be left to his remedy at common law (*l*).

But where the wife changed her solicitor, the former

(*g*) *Cale v. James*, (1897) 1 Q. B. 418; 66 L. J., Q. B. D. 249; 76 L. T. 119.

(*h*) *Kunski v. Kunski* (1899), 68 L. J. P. 18.

(*i*) *Medway v. Medway*, (1900) P. 141; 69 L. J. P. 56; 82 L. T. 627. See also *Earnshaw v. Earnshaw*, (1896) P. 160; 65 L. J. P. 89; 74 L. T. 560; *Sirrell v. Sirrell*, (1911) P. 38; 104 L. T.

79; 80 L. J. P. 8.

(*k*) *Waudley v. Waudley and Bowland*, (1902) P. 85; 71 L. J. P. 43; 86 L. T. 123.

(*l*) *Nairne v. Nairne* (1902), 71 L. J. P. 37; 85 L. T. 649. And see as to position of solicitor, where wife returns to cohabitation with her husband pending suit, *Warwick v. Warwick* (1901), 85 L. T. 173.

solicitor was allowed to tax his costs in the Divorce Division, and the proceedings may be stayed until his costs have been dealt with (*m*).

Against co-respondent.

The Court may order the costs of the proceedings to be paid by the co-respondent where the adultery is established, although the petitioner may not have prayed for such costs (*n*). It is now so thoroughly settled as a matter of daily practice that a co-respondent is never condemned in costs if at the time he committed adultery with the respondent he did not know she was a married woman, or had reason to suspect it, that it would be superfluous to cite cases on the point.

Not necessary to ask for costs against co-respondent in prayer of petition.

Where a co-respondent countercharged condonation and adultery against the petitioner, and the Court found that the co-respondent had committed adultery with the respondent without knowing she was married, but acquitted petitioner, the co-respondent was condemned in the costs caused by his countercharges only (*o*).

Co-respondent condemned in part only of the costs.

In a case where the wife's conduct had been profligate with the husband's knowledge, before the adultery committed with the co-respondent, the latter was not condemned in costs (*p*).

Wife profligate. Co-respondent not condemned in costs.

In a case where the Court thought the petitioner had made an improper claim for damages, the co-respondent was not condemned in costs (*q*).

But costs have been given against a co-respondent where he well knew the respondent was a married woman, though there was some remissness on the part of the husband (*r*). The exercise of the discretion as to costs

Discretion of Court.

(*m*) *Jinks v. Jinks*, (1911) P. 120; 104 L. T. 655.

(*p*) *Boyd v. Boyd and Collins* (1859), 1 S. & T. 562.

(*n*) *Finlay v. Finlay and Rudall* (1861), 30 L. J. P. 104. See also *Goldsmith v. Goldsmith, Dalrymple, Nicolls and Wooley* (1862), 31 L. J. P. 163.

(*q*) *Manton v. Manton and Stevens* (1865), 4 S. & T. 159; 34 L. J. P. 121.

(*r*) *Badcock v. Badcock and Chamberlain* (1858), 1 S. & T. 188.

(*o*) *Howe v. Howe* (1867), 15 W. R. 498.

Against co-respondent.

Mat. C. Act, 1857, s. 34.

vested in the Court by section 34 of Matrimonial Causes Act, 1857, depends upon the opinion of the Court as to the conduct of all the parties in each case; and even if it is proved that the co-respondent knew the respondent to be a married woman when the adultery was committed, it does not necessarily follow that he will be condemned in the whole or any part of the costs, although this is nearly always the case.

Costs of two trials.

Co-respondent not condemned though knowing respondent was married.

So where a jury were unable to agree on a first trial, and on a second trial the petitioner obtained a verdict, the Court refused to condemn the co-respondent in the costs of the first trial (*s*). And where a wife had lived apart from her husband for some years, and led an abandoned life, the Court, notwithstanding that the co-respondent must have known that she was a married woman, refused to condemn him in costs (*t*).

Misconduct of petitioner.

Where the Court was of opinion that the conduct of the petitioner had been such as to invite reasonable challenge, it condemned the co-respondent only in so much of the costs of the suit as had been incurred in proving the respondent's adultery with him (*u*).

Adultery with co-respondent condoned.

Where a husband petitioned for a divorce on the ground of adultery with the co-respondent, which he had condoned, the Court of Appeal held that the petition must be dismissed, and the petitioner condemned in the co-respondent's costs (*x*).

Where a husband had condoned adultery committed with a co-respondent which had been revived by adultery

(*s*) *Wood v. Wood and Stanger* (1868), L. R., 1 P. & D. 467; 37 L. J. P. 25; 18 L. T. 110.

(*t*) *Nelson v. Nelson and Howson* (1868), L. R., 1 P. & D. 510.

(*u*) *Codrington v. Codrington and Anderson* (1865), 4 S. & T.

63; 34 L. J. P. 60. See also *Bremner v. Bremner and Brett* (1864), 3 S. & T. 378; 33 L. J. P. 202; 10 L. T. 99.

(*x*) *Bernstein v. Bernstein, Sampson and Turner*, (1892) P. 375; 62 L. J. P. 16; 67 L. T. 52.

committed by another person, costs were not given against the co-respondent whose adultery was condoned (*y*).

Where the adultery of the wife was proved, but the petition was dismissed on account of the husband's adultery, the co-respondent was not condemned in costs, nor allowed any (*z*).

Where a decree *nisi* was afterwards rescinded on the ground of the petitioner's adultery committed *subsequent* to the date of the decree, an order condemning the co-respondent in costs was not rescinded (*a*).

Where a co-respondent, convicted of adultery, succeeded in proving incestuous adultery against the husband, it was held that he was entitled to be paid the costs of the issue against the husband on which he had succeeded (*b*). And where the petitioner had condoned his wife's adultery with the co-respondent, and had connived at her adultery with another person, the Court ordered the petitioner to pay the costs of the respondent and of the co-respondent (*c*). But where the jury found that the respondent had been guilty of adultery, but that there was not sufficient evidence against the co-respondent, though his conduct had been such as to lead to a reasonable suspicion in the mind of the petitioner that he had been guilty of adultery, the Court refused to allow him his costs (*d*). And where there had been an improper intimacy (not amounting to adultery) between the co-respondent and the respondent, the co-respondent was ordered to pay his own costs, though

Against co-respondent.

Petition dismissed on ground of husband's adultery.

Petitioner guilty of adultery after decree *nisi*.

When co-respondent entitled to.

Petitioner guilty of incestuous adultery.

Condonation and connivance.

Co-respondent guilty of indiscreet familiarity only.

(*y*) *Norris v. Norris, Lawson and Mason* (1861), 4 S. & T. 237; 30 L. J. P. 111.

(*z*) *Seddon v. Seddon and Doyle* (1862), 2 S. & T. 640; 31 L. J. P. 101; 7 L. T. 253; *Bremner v. Bremner* (see previous page).

(*a*) *Hulse v. Hulse and Tavernor* (Queen's Proctor intervening) (1871), L. R., 2 P. &

D. 357; 41 L. J. P. 19; 25 L. T. 764.

(*b*) *Conradi v. Conradi and Flashman* (1866), L. R., 1 P. & D. 63; 35 L. J. P. 49; 14 L. T. 170.

(*c*) *Adams v. Adams and Colter* (1867), L. R., 1 P. & D. 333; 36 L. J. P. 62; 16 L. T. 69.

(*d*) *Robinson v. Robinson and Gamble* (1860), 32 L. J. P. 210.

Against co-respondent.

Application to dismiss co-respondent.

Payment of costs.

Costs of altering marriage settlement.

Partial order for costs.

Petitioner guilty of adultery, co-respondent partially condemned in costs.

Costs of inquiry before registrar on apportionment of damages.

the petition was dismissed (*e*). When a petition is dismissed the Court does not always order the petitioner to pay the co-respondent's costs; the order it makes as to costs will depend upon the special circumstances of each particular case (*f*).

When in a suit for dissolution the co-respondent is condemned in costs, he is liable for the costs of the proceedings to obtain alimony, also for the costs of all parties, including the trustees, incurred in and incidental to a petition to vary the settlements (*g*). But if part of such an application fails, the costs of that part ought not to be thrown on the co-respondent (*h*). Where a petition was dismissed on the ground of the adultery of the petitioner, but at the same time an order was made condemning the co-respondent in the costs incurred by the petitioner in proving his adultery with the respondent, the Court held that this order comprised all the expenses incidental to the filing and prosecution of the petition so far as they related to the adultery of the co-respondent (*i*).

A co-respondent condemned in costs is liable for costs of and incidental to proceedings before registrar for apportionment of damages (*k*).

A jury found the co-respondent guilty of adultery with

(*e*) *Winscom v. Winscom and Plowden* (1864), 3 S. & T. 380; 33 L. J. P. 45; 10 L. T. 100.

(*f*) For cases where the Court ordered the petitioner to pay the co-respondent's costs on the petition being dismissed, see *Whitmore v. Whitmore and Brettell* (1865), L. R., 1 P. & D. 25; 35 L. J. P. 32; 13 L. T. 610; and for cases where such order was refused, see *Bancroft v. Bancroft and Rumney* (1865), 34 L. J. P. 144; *Wight v. Wight and Field* (1867), L. R., 1 P. & D. 368; 36 L. J. P. 129; 16 L. T.

300; *West v. West and Parker* (1870), L. R., 2 P. & D. 196; 40 L. J. P. 11; 23 L. T. 786.

(*g*) *Gill v. Gill and Hogg* (1863), 3 S. & T. 359; 33 L. J. P. 43; 10 L. T. 137; *Smithe v. Smithe and Roupell* (1868), L. R., 1 P. & D. 592.

(*h*) *Stone v. Stone* (1864), 10 L. T. 140.

(*i*) *Baker v. Baker and Grigg* (1867), 36 L. J. P. 119.

(*k*) *Irwin v. Irwin and Layard* (1890), 59 L. J. P. 53; 62 L. T. 612.

the respondent. The issue of the respondent's adultery being for the Court, the Court, after examining her, arrived at the conclusion that she had not been guilty of adultery, she being a person of weak intellect, and the connection having been against her will, but condemned the co-respondent in costs (*l*).

Against co-respondent.

Wife acquitted of adultery, co-respondent found guilty notwithstanding.

1904.

Condonation by husband.

Condonation by a husband after decree *nisi* is no reason for relieving the co-respondent of his liability for costs (*m*).

The rule is, that where a co-respondent does not know that the respondent is a married woman he will not be condemned in costs; and where a co-respondent discovered a week after he commenced an intimacy with the respondent that she was a married woman, but nevertheless continued to cohabit with her, the Court, taking all the circumstances of the case into consideration, refused to condemn him in costs (*n*); but where a co-respondent denied that he knew the respondent was married on their first acquaintance, but admitted that he became aware of the fact within a fortnight, the Court, being of opinion that practically he knew the fact from the first, condemned him in costs (*o*).

Co-respondent guilty of adultery not condemned in costs.

1902.

Co-respondent admitted knowing respondent was married within a fortnight of first acquaintance.

Where a foreign co-respondent appeared in the first instance unconditionally, and afterwards successfully disputed the jurisdiction of the Court, the Court, as he had not availed himself of the earliest opportunity of taking exception to the jurisdiction, gave him only his costs of

Co-respondent successfully pleading to jurisdiction, delay in doing so.

(*l*) *Long v. Long and Johnson* (1890), 15 P. D. 218; 60 L. J. P. 27.

to co-respondent, *Newby v. Newby and White* (1897), 77 L. T. 142; *Robinson v. Robinson* (1898), 78 L. T. 391; *Brown v. Brown and Robey* (1869), 21 L. T. 181.

(*m*) *Hyman v. Hyman and Goldman* (King's Proctor showing cause), (1904) P. 403; 73 L. J. P. 106; 91 L. T. 361.

(*o*) *Bilby v. Bilby and Harrop*, (1902) P. 8; 71 L. J. P. 31; 86 L. T. 123.

(*n*) *Learmonth v. Learmonth and Austin* (1889), 59 L. J. P. 14; 62 L. T. 608. See further as

Against co-respondent.

appearance (*p*); and where a foreign co-respondent entered an absolute appearance and then applied to be dismissed the suit, the Court dismissed him but refused to give him his costs, as he had entered an absolute appearance (*q*).

Scotch co-respondent.

But where a Scotch co-respondent applied to be dismissed from the suit, his application was refused with costs (*r*). Previously to the decision in this case, a Scotch or Irish co-respondent had always been on the same footing as a foreigner.

Co-respondent bankrupt.

After a decree for a dissolution of marriage, an order made by the Court upon the co-respondent to pay the petitioner's costs is not a "final judgment" within the Bankruptcy Act, 1883; a bankruptcy notice cannot therefore be issued against the co-respondent in respect of such an order (*s*).

1901.

Cross suits.
Order for consolidation.
Position of co-respondent.

It was held by the Court of Appeal, reversing the decision of the Court below, that an order consolidating a wife's petition for a judicial separation and her husband's petition for divorce against her, was not a consolidation within the strict meaning of the term, so as to make the two suits one proceeding, and that the Court had no jurisdiction either under the Mat. C. Act, 1857, s. 34, or under the Judicature Act, 1890, s. 5, to order the co-respondent to pay any part of the costs of the wife's suit to which he was not a party (*t*).

(*p*) *Grange v. Grange and Arendt*, (1892) P. 245; 61 L. J. P. 125; 67 L. T. 360.

(*q*) *Levy v. Levy and de Rorance*, (1908) P. 256; 77 L. J. P. 95; 99 L. T. 212. See also *Baker v. Baker and Dwyer*, (1908) P. 257; 77 L. J. P. 96; 99 L. T. 313.

(*r*) *Fairfax v. Fairfax and de la Cruz* (1909), 99 L. T. 892; *Rayment v. Rayment and Stuart*,

(1910) P. 271; 103 L. T. 430; 79 L. J. P. 115; *Chapman v. Chapman and Buist*, (1910) P. 271; 103 L. T. 430; 79 L. J. P. 115.

(*s*) *Dale, Ex parte, Binstead, In re*, (1893) 1 Q. B. 199; 62 L. J., Q. B. 207; 68 L. T. 31.

(*t*) *Forbes-Smith v. Forbes-Smith and Chadwick*, (1901) P. 258; 70 L. J. P. 61; 84 L. T. 789.

It has been for many years the practice of the Court to allow her costs to a wife petitioner successfully suing *in formâ pauperis* (u); but it has been held by the Court of Appeal that the rule laid down in *Carson v. Pickersgill & Sons* (x) that a successful plaintiff suing *in formâ pauperis* in an action tried before a judge and jury is entitled, upon taxation, as against the defendant, to costs out of pocket only, applies in the case of a pauper petitioner for a divorce against the co-respondent (y).

Against co-respondent.

Costs of parties suing *in formâ pauperis*.

Against co-respondent.

By section 2 of the Matrimonial Causes Act, 1878 (41 Vict. c. 19), "Where the *Queen's Proctor* or *any other person* shall intervene or show cause against a decree *nisi* in any suit or proceeding for divorce or for nullity of marriage, the Court may make such order as to the costs of the Queen's Proctor, or of any other person who shall intervene or show cause as aforesaid, or of all and every party or parties thereto, occasioned by such intervention or showing cause as aforesaid, as may seem just; and the Queen's Proctor, any other person as aforesaid, and such party or parties shall be entitled to recover such costs in like manner as in other cases: Provided that the Treasury may, if it shall think fit, order any costs which the Queen's Proctor shall, by any order of the Court made under this section, pay to the said party or parties, to be deemed to be part of the expenses of his office."

Two kinds of intervention :

1st, "Any person";

2nd, Queen's Proctor.

Costs.

Mat. C. Act, 1878, s. 2.

The King's Proctor is now condemned in costs whenever the Court deems that his intervention was uncalled for.

King's Proctor may be condemned in.

For cases on this question, see below (z).

(u) *Afford v. Afford* (1861), 2 S. & T. 337; 30 L. J. P. 174; 5 L. T. 138.

(x) (1885), 14 Q. B. D. 859; 54 L. J., Q. B. 484; 52 L. T. 950.

(y) *Richardson v. Richardson*, (1895) P. 346; 64 L. J. P. 119;

73 L. T. 135.

(z) *Collins v. Collins and Smith* (1881), 44 L. T. 31; *Vivian v. Vivian and Waterford* (Leslie intervening) (1870), L. R., 2 P. & D. 100; 39 L. J. P. 54; 23 L. T. 267; *Barnes v. Barnes and Grimwade* (Queen's Proctor in-

The King's Proctor stands in exactly the same position as to costs as any other intervener, and there is no practice not to order the King's Proctor to pay the costs of an unsuccessful intervention (a).

Intervention
by Queen's
Proctor and
other inter-
veners.
Costs.
Co-respon-
dent.

In *Blackhall v. Blackhall and Clarke* (Queen's Proctor intervening) (b), Butt, J., held that the Court had no right either under section 2 of the Matrimonial Causes Act, 1878, or under section 34 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), which gives a general power to the Court to condemn a co-respondent, where the fact of his adultery has been established, in "*the whole or any part of the costs of the proceedings*," to condemn the co-respondent in the costs arising out of an intervention of the Queen's Proctor.

Where a person charged by the King's Proctor with having committed adultery with the petitioner, intervened, such person, as well as the petitioner, was upon the dismissal of the petition condemned in the costs of the King's Proctor (c).

tervening) (1867), L. R., 1 P. & D. 505; 37 L. J. P. 4; 17 L. T. 286; 16 W. R. 281; *Wilson v. Wilson* (1866), L. R., 1 P. & D. 180; 14 L. T. 674; *Bowen v. Bowen and Evans* (Queen's Proctor intervening) (1864), 3 S. & T. 530; 33 L. J. P. 129; *Joyce v. Joyce* (Queen's Proctor intervening) (1864), 33 L. J. P. 200; *Lautour v. Queen's Proctor* (1864), 33 L. J. P. 89; 10 H. L. C. 685; 10 L. T. 611; *Cox v. Cox* (1861), 2 S. & T. 306; 30 L. J. P. 255; 4 L. T. 450; *Forster v. Forster and Berridge* (Graham intervening) (1863), 3 S. & T. 151; 32 L. J. P. 206; 9 L. T. 148; *Gladstone v. Gladstone* (1875), L. R., 3 P. & D. 260; 44 L. J. P. 46; 32 L. T.

404; *Tomkins v. Tomkins* (Queen's Proctor intervening) (1872), 20 W. R. 497.

(a) *Westcott v. Westcott* (King's Proctor showing cause), (1908) P. 250; 77 L. J. P. 102; 99 L. T. 310; *Higgins v. Higgins* (King's Proctor showing cause), (1910) P. 1; 79 L. J. P. 10; *Carter v. Carter* (King's Proctor showing cause), (1910) P. 4; 79 L. J. P. 12; 101 L. T. 812; *Higgins v. King's Proctor*, (1910) P. 151, C. A.; 79 L. J. P. 37, C. A.; 102 L. T. 259; *King's Proctor v. Carter*, (1910) P. 151, C. A.; 79 L. J. P. 37, C. A.; 102 L. T. 259.

(b) (1888), 13 P. D. 94; 57 L. J. P. 60; 59 L. T. 151.

(c) *Davison v. Davison* (King's

Where a decree *nisi* is rescinded it is rescinded for all purposes, and that part of it condemning the co-respondent in costs generally falls with it (*d*); but see *Hyman v. Hyman and Goldman* (King's Proctor showing cause) (*e*) and *Quartermaine v. Quartermaine and Glenister* (*f*), where the co-respondent still had to pay the costs.

Where the Queen's Proctor intervened, and the petitioner filed no answer to the Queen's Proctor's pleas, the decree was rescinded, including that portion of it condemning the co-respondent in costs (*g*).

In a case where the Queen's Proctor had intervened, a jury found that both husband and wife had been guilty of collusion. The husband had paid into Court 140*l.*, to meet the wife's costs. The Court had refused (and the Court of Appeal had confirmed this decision) to allow any part of the sum to be paid out to the wife or her solicitors. The Court, on application of the Queen's Proctor, ordered the whole sum of 140*l.* to be paid out to him in part payment of his costs (*h*).

A wife is not entitled to have money paid into Court by her husband to meet her costs paid out to her pending the King's Proctor's intervention (*i*).

It is not the practice of the Court to order a husband to

Proctor showing cause; *Montgomerie* intervening), (1909) P. 308; 79 L. J. P. 9.

(*d*) *Hechler v. Hechler and Bennett* (1888), 58 L. J. P. 27. See also *Hyman v. Hyman and Goldman* (King's Proctor showing cause), (1904) P. 403; 73 L. J. P. 106; 91 L. T. 361. See also *Ravenscroft v. Ravenscroft and Smith* (Queen's Proctor intervening) (1872), L. R., 2 P. & D. 376; 41 L. J. P. 28; 26 L. T. 265; *Youell v. Youell*, *Ter-*

rass and Burleigh (Queen's Proctor intervening) (1875), 33 L. T. 578.

(*e*) (1904) P. 403; 73 L. J. P. 106; 91 L. T. 361.

(*f*) (1911) P. 180; 105 L. T. R. 80.

(*g*) *Hechler v. Hechler*, *supra*.

(*h*) *Butler v. Butler* (1890), 15 P. D. 161; 59 L. J. P. 86; 63 L. T. 260.

(*i*) *Butler v. Butler* (1889), 14 P. D. 160; 58 L. J. P. 71.

Decree *nisi* rescinded.

Petitioner filing no answer to Queen's Proctor's intervention.

Costs of Queen's Proctor.

King's Proctor's costs.

Refusal to pay out money deposited for costs pending intervention.

Security for costs.

give security for his wife's costs incidental to an intervention of the King's Proctor (*k*).

Petitioner
and co-
respondent
charged with
collusion.

Where the Queen's Proctor intervened, and established a charge of collusion against both the petitioner and co-respondent, the Court condemned the co-respondent in the costs of the Queen's Proctor's intervention, although he did not appear (*l*).

1898.
Pauper cause.

The costs of the Queen's Proctor's intervention are entirely in the discretion of the Court, and an unsuccessful pauper litigant is liable to an order condemning him in the full costs (*m*).

1903.
Other inter-
venor's costs.

Where a wife petitioner charged her husband with adultery with a certain lady, and the husband would not deny the charge, the lady in question obtained leave to intervene and succeeded in negating the charges against her: the Court, holding that the intervenor ought to be put in the best possible position to obtain the costs which she had properly incurred in defending herself, made an order against both the petitioner and respondent to pay her costs (*n*).

House of
Lords making
no order as
to costs.

Appeal to
House of
Lords.

Order for
costs after
decree
absolute.

On appeal to the House of Lords a sentence of the Court, dismissing a wife's petition for a decree of nullity of marriage, was reversed, and the House declared the marriage null, but made no order as to costs (*o*).

It has been held that, in a suit for dissolution of marriage, it would not be acting within the spirit of section 51 of the Matrimonial Causes Act, 1857, to condemn a party in the costs of the proceedings after the decree has been made absolute (*p*).

(*k*) *Butler v. Butler* (1890),
15 P. D. 32; 59 L. J. P. 30; 62
L. T. 477.

(*l*) *Taplen v. Taplen and
Cowen* (Queen's Proctor inter-
vening), (1891) P. 283; 60 L. J.
P. 88; 64 L. T. 870.

(*m*) *White v. White* (Queen's
Proctor showing cause), (1898) P.

124; 67 L. J. P. 63.

(*n*) *Wade v. Wade* (Brooke
intervening), (1903) P. 16; 72
L. J. P. 1; 87 L. T. 751.

(*o*) *L. v. H.* (1867), L. R., 1
P. & D. 293; 36 L. J. P. 76.
See also *Begg v. Begg* (1890),
15 App. Cas. 170.

(*p*) *Wait v. Wait and Flower*

Where in a petition for dissolution of marriage the husband, who was an uncertificated bankrupt, claimed damages; upon application by the co-respondent the Court held, that unless the claim for damages was withdrawn the petitioner must give security for the costs of the action (*q*). But in a later case it was held that, in spite of the above decision, a petitioner who was an undischarged bankrupt might claim damages, without being compelled to give security for the co-respondent's costs (*r*).

Petitioner an
uncertificated
bankrupt.

On a petition for variation of settlements, the Court refused to allow the petitioner's costs to be paid out of the capital of the settlement (*s*).

Variation of
settlements.

But where at the time of an application for variation of settlements a wife was indebted to her solicitor in the sum of 49*l.* 16*s.* 9*d.* for costs, and there appeared no chance of recovering this sum from the husband, the Court allowed it to be paid out of the corpus of the settled property (*t*).

Costs allowed
to be paid
out of settled
property.

In a nullity suit where the Court ordered both the husband and wife's settled funds to be re-conveyed to them, it further ordered that the costs of both the wife and the trustees be paid out of the husband's fund (*u*).

Wife's costs.
Variation of
settlements,
nullity suit.

Where the Court, before final decree, directs an inquiry as to a wife's property with the view of ordering a settlement to be made, it will also direct the husband to give security for costs (*x*).

Security for
costs.

(1871), L. R., 2 P. & D. 228;
40 L. J. P. 30; 24 L. T. 846.

only appeared, see *Storer v. Storer* (1894), 71 L. T. 704.

(*q*) *Smith v. Smith and Palk* (1882), 7 P. D. 227; 47 L. T. 355.

(*t*) *Hipwell v. Hipwell*, (1892) P. 147; 61 L. J. P. 84; 67 L. T. 396. See also *Hamilton v. Hamilton and Pralormo* (1893), 68 L. T. 467; *Arkwright v. Arkwright* (1895), 73 L. T. 287.

(*r*) *Blackett v. Blackett and Frail*, (1902) P. 170; 71 L. J. P. 69; 86 L. T. 669.

(*u*) *Attwood (otherwise Pome-roy) v. Attwood*, (1903) P. 7; 71 L. J. P. 129; 87 L. T. 750.

(*s*) *Ponsonby v. Ponsonby* (1884), 9 P. D. 122; 53 L. J. P. 112; 51 L. T. 174. For a later case relating to the costs of trustees of a marriage settlement, where two out of three trustees

(*x*) *Midwinter v. Midwinter*, (1892) P. 28; 61 L. J. P. 1; 65 L. T. 438.

New trial.
Security for
costs.

No security for costs need be given on a motion to the Court of Appeal for a new trial of a divorce case that has been tried by a jury (*y*).

Husband
excused from
payment of
wife's costs.

Where a wife refused to comply with a decree for restitution, the Court decided that it had no power, under the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), s. 3, to order a settlement of the wife's property, she being restrained from anticipation; but it refused under the circumstances to order the petitioner to pay the respondent's costs (*z*).

Legitimacy
declaration
costs.

In proceedings under the Legitimacy Declaration Act, the Court has jurisdiction to order a person who has been cited, and who has appeared and opposed the petition, to pay the costs of the petitioner (*a*).

Compromise
of suit.
Costs of
carrying into
effect.

The parties to a suit for judicial separation made an agreement for the settlement of it, providing for the execution of a separation deed, that the respondent should pay the costs of the petitioner's suit, and that the agreement might be made a rule of Court. The Court held that, as the agreement was enforceable by specific performance, or in any Division of the High Court of which it might be made a rule, the carrying out of it was not a step in the suit, and the Court had therefore no jurisdiction over the costs of the deed, and this view was affirmed on appeal (*b*).

Compromise,
costs of.

See also Part II., tit. "Practice as to Costs" (p. 540).

(*y*) *Rickaby v. Rickaby and Swift*, (1901) P. 134; 70 L. J. P. 24; 84 L. T. 182.

7 P. D. 228; 51 L. J. P. 84; 37 L. T. 129.

(*z*) *Michell v. Michell*, (1891) P. 305; and see further as to costs of variation of settlements generally, *Carstairs v. Carstairs, Dickenson and Others* (1864), 3 S. & T. 538; 33 L. J. P. 170; 10 L. T. 696; *Noel v. Noel* (1885), 10 P. D. 179; 54 L. J. P. 73; *Wigney v. Wigney* (1882),

(*a*) *Bain v. Att.-Gen.* (Usher intervening), (1892) P. 261; 61 L. J. P. 135; 67 L. T. 447.

(*b*) *Lancaster v. Lancaster*, (1896) P. 118; 65 L. J. P. 34; 74 L. T. 64. See also *Smythe v. Smythe* (1887), 18 Q. B. D. 544; 56 L. J., Q. B. 217; 56 L. T. 197.

CHAPTER XVII.

EVIDENCE.

IN the Ecclesiastical Courts the evidence was almost always taken by means of written depositions verified by affidavit; for, although for some few years before the passing of the Matrimonial Causes Act, 1857, there was a statute in force enabling evidence in these Courts to be taken *vivâ voce*, this course was rarely adopted.

But by section 46 of the Matrimonial Causes Act, 1857, it was enacted that:—

“Subject to such rules and regulations as may be established as herein provided, the witnesses in all proceedings before the Court, where their attendance can be had, shall be sworn and examined orally in open Court: Provided that parties, except as hereinbefore provided, shall be at liberty to verify their respective cases in whole or in part by affidavit; but so that the deponent in every such affidavit shall, on the application of the opposite party or by direction of the Court, be subject to be cross-examined by or on behalf of the opposite party orally in open Court, and after such cross-examination may be re-examined orally in open Court as aforesaid by or on behalf of the party by whom such affidavit was filed” (*a*).

At the time of the passing of the Matrimonial Causes Act, 1857, the parties to a matrimonial suit were not com-

In the Ecc.
Courts,
evidence, how
taken.

Mode of
taking
evidence.
20 & 21 Vict.
c. 85, s. 46.

(*a*) As to affidavits and commissions and examinations of witnesses, discovery and inspection, hearing cases *in camera*, and other matters of practice, see *post*, Part II. p. 604, tit. “Evidence.”

Parties to
suit not
competent
witnesses at
time of
passing M. C.
Act, 1857.

petent witnesses as to adultery, cruelty, desertion, or indeed any other matrimonial offence.

The first step taken by the Legislature in the direction of removing this disability was by section 43 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), which provides that:—

Examination
of petitioner
under order
of the Court.

“The Court may, if it shall think fit, order the attendance of the petitioner, and may examine him or her, or permit him or her to be examined or cross-examined on oath on the hearing of any petition; but no such petitioner shall be bound to answer any question tending to show that he or she has been guilty of adultery” (b).

Mat. C. Act,
1859, s. 6.
Both husband
and wife
competent,
&c. to give
evidence as to
cruelty and
desertion.

In the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), the Legislature went a step further, and section 6 of that Act provides that, “On any petition presented by a wife, praying that her marriage may be dissolved by reason of her husband having been guilty of adultery coupled with cruelty, or of adultery coupled with desertion, the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion.”

Evidence Act,
1869 (32 & 33
Vict. c. 68),
s. 3.

Finally, all restrictions on the competence of parties to give their evidence on oath in matrimonial causes were removed, and by virtue of section 3 of the Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68),

Parties
and their
husbands and
wives to be
witnesses in
suits for
adultery.

“The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding: Provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have

(b) This section has never been repealed. An order compelling the attendance of the petitioner was made in a suit for judicial separation about six months prior

to the passing of the Evidence Act, 1869, in the case of *Ross v. Ross* (1869), L. R., 1 P. & D. 629; 38 L. J. P. 33; 20 L. T. 232.

already given evidence in the same proceeding in disproof of his or her alleged adultery" (c).

The general rules and principles that apply to evidence in actions in other Courts apply equally to matrimonial actions tried in the Probate, Divorce and Admiralty Division, and will be found in treatises on the law of evidence, such as "Taylor on Evidence," "Best on Evidence," "Roscoe's Nisi Prius," and the like.

General rules and principles as to evidence.

As a rule, in matrimonial causes the burden of proof is on the petitioner, who has the right to begin.

Right to begin.

But where a wife, in answer to a petition for judicial separation, alleged that the marriage was void on the ground of the husband's impotence, the Court held that this was merely a traverse and that therefore the husband had the right to begin (d).

Burden of proof on respondent alleging nullity.

Where a wife petitioned for restitution, and the husband, having first in his answer countercharged adultery, subsequently filed a cross-petition for divorce, and the suits were consolidated: the Court held the burden of proof was on him, and he had the right to begin (e).

In consolidated suits. 1900.

Where the petitioner began on the Queen's Proctor's intervention, the Court held that the Queen's Proctor had the right to reply (f); and the King's Proctor is entitled to examine and cross-examine all the witnesses called by the petitioner and respondent (g).

Reply. King's Proctor and other interveners.

Where the King's Proctor and other interveners appear in the same suit, both the King's Proctor and the other

Ibid.

(c) Since the passing of this statute the bulk of the older cases cited in the earlier editions of "Browne on Divorce," under the head of "Evidence," have become of no value. *Ruck v. Ruck and Croft*, (1911) P. 90; 104 L. T. 462; 80 L. J. P. 17.

(d) *Serrell v. Serrell and Bamford* (1862), 2 S. & T. 422; 31 L. J. P. 55; 5 L. T. 691.

(e) *Smith v. Smith and Charlesworth*, (1900) P. 66; 69 L. J. P. 44.

(f) *Conradi v. Conradi, Worrell and Way* (the Queen's Proctor intervening), (1868), L. R., 1 P. & D. 514; 37 L. J. P. 55; 18 L. T. 659.

(g) *Boardman v. Boardman* (Queen's Proctor intervening) (1866), L. R., 1 P. & D. 233.

interveners have the right to produce and examine witnesses, and cross-examine all witnesses called by the other parties, but only counsel for King's Proctor can be heard in reply (*h*).

Intervener alleging collusion.

An intervener alleging collusion, as well as the same facts alleged in the respondent's answer, is not bound to prove collusion before giving evidence of such facts (*i*).

Practice as to calling parties.

Where the petitioner begins, as soon as counsel has opened his case, the petitioner is now nearly always put into the box, and gives evidence as to so much of the facts of the case as are within his or her knowledge, and is cross-examined upon them. Then the rest of the witnesses in support of the case for the petitioner are called.

Decree *nisi* pronounced without petitioner's evidence.

A decree *nisi* is now hardly ever pronounced without the evidence of the petitioner, although there is one comparatively recent case reported in which this was done (*k*). If the petitioner is out of the country or is compelled for some good reason to go abroad, the practice is to take his evidence on commission or by affidavit. An application to the Court is necessary.

Evidence of respondent and co-respondent.

When the suit is defended, the respondent or co-respondent, or both, go into the box and give their evidence.

Usual result of parties refusing to answer questions as to their guilt.

Although by virtue of the statutory proviso a party giving evidence is not, except under certain circumstances, liable to be asked or compellable to answer any questions calculated to incriminate him or her in a charge of adultery, if such party goes into the box and does not deny the charge, or without sufficient reason fails to go into the box and give evidence when he or she ought to do so, the circumstance will be taken strongly against such party, and may be considered so far corroborative of guilt as to make

(*h*) *Dering v. Dering and Blakeley* (Queen's Proctor and Others intervening) (1868), L. R., 1 P. & D. 531; 37 L. J. P. 52; 19 L. T. 48.

(*i*) *Harding v. Harding* (1864), 4 S. & T. 145; 34 L. J. P. 108; 13 L. T. 195.

(*k*) *Nicolson v. Nicolson and Fairley* (1892), 68 L. T. 28.

what was previously a weak case against him or her into a strong one.

A petition to vary a settlement is not a proceeding instituted in consequence of adultery, within the meaning of section 3 of the Evidence Further Amendment Act, 1869. And a witness called upon the trial of an issue as to legitimacy directed upon a petition to vary is not protected from being liable to answer questions tending to show that he or she has committed adultery, either by statute, or by the general rule of law that a witness is not bound to incriminate himself or herself (*l*).

The Court will not act upon the uncorroborated evidence of a party to a matrimonial action.

A party who is produced as a witness on his own behalf, and denies the truth of some of the charges of adultery contained in the pleadings, but is asked no questions as to others, is liable to be cross-examined about all the charges (*m*).

Evidence of verbal statements made by a wife's paramour, previously to the birth of a child, is admissible as tending to show that he was its father (*n*). And it was held in the same case that, notwithstanding the Evidence Act, 1869, the evidence of a husband is not admissible in a proceeding to prove the illegitimacy of a child born in wedlock.

But in 1903 the House of Lords accepted the evidence of Lord Poulett, who died in 1899, given in a suit to perpetuate testimony, against the legitimacy of a son born in wedlock (*o*).

Liability of witness to answer questions tending to show adultery.

Variation of settlement, issue as to legitimacy.

Uncorroborated evidence of a party.

Party giving evidence as to adultery, liability to answer further questions.

Admissibility of statements of wife's paramour as to legitimacy of child born in wedlock.

Ibid. of husband.

(*l*) *Evans v. Evans and Blyth*, (1904) P. 378; 73 L. J. P. 114; 91 L. T. 600.

(*m*) *Brown v. Brown and Paget* (Queen's Proctor intervening) (1874), L. R., 3 P. & D. 198; 43 L. J. P. 33; 30 L. T. 767; and see further on this point *Babbage v. Babbage and Man-*

ning (1870), L. R., 2 P. & D. 222.

(*n*) *Burnaby v. Baillie* (1889), 42 Ch. D. 282; 58 L. J., Ch. 842; 61 L. T. 634. See also *Ulverstone Union v. Park* (1889), 53 J. P. 629.

(*o*) *Poulett Peerage Claim*, (1903) A. C. 395; 72 L. J., K. B. 924 (H. L.).

Child born
in wedlock.
Presumption
of legitimacy.

The presumption in favour of the legitimacy of a child born in wedlock, within the usual period of gestation, though exceedingly strong, may be rebutted by appropriate evidence (*p*). But mere evidence of the mother's adultery will not suffice unless it is shown by positive evidence to the satisfaction of the Court that no connection did take place between the husband and wife which could have resulted in the conception of this particular child. It must be shown that the husband could not have had access which might result in his paternity (*q*).

Husband
making
charges of
pre-marital
misconduct
against wife.

Where a wife charges her husband with cruelty, and alleges (among other things) that he has made charges of pre-marital misconduct against her in the presence of other persons, which he stated he had discovered some time after marriage, although documents may be admitted to show the *bona fides* of the husband in making such charges, no evidence is admissible tending to prove the truth of the charges against the wife unless the husband is called as a witness (*r*).

Statements
to third
persons.

A witness called to prove cruelty against a husband may be asked whether the wife made a complaint about her husband on a certain occasion, but the witness must only answer "yes" or "no" (*s*).

Evidence of
adultery
committed
after date of
petition
admitted.

Where a husband was only able to prove acts of great familiarity between the respondent and co-respondent before the date of the petition, which, though they did not amount to adultery, were suggestive of it: the Court allowed him to give evidence of actual adultery committed after the date of the petition, on the ground that such evidence tended to show what inferences ought to be drawn from the acts of familiarity proved to have been committed before the date of the petition (*t*).

(*p*) *Poulett Peerage Claim*,
(1903) A. C. 395; 72 L. J., K.
B. 924 (H. L.).

(*q*) *Gordon v. Gordon & Gran-
ville Gordon*, (1903) P. 141; 72
L. J. P. 33; 89 L. T. 73.

(*r*) *Walker v. Walker* (1898),
77 L. T. 715.

(*s*) *Berry v. Berry and Car-
penter* (1898), 78 L. T. 688.

(*t*) *Wales v. Wales and Cullen*,
(1900) P. 63; 69 L. J. P. 34.

The burden of showing that a co-respondent knew that the respondent was a married woman is cast on the petitioner, and, in the absence of evidence, a jury should assume that he was not aware of the fact (*u*).

The fact of the physical incapacity of a husband or wife may be inferred from their conduct; so where one of the parties obstinately refuses to consummate the marriage, the Court is justified in assuming that such refusal is caused by a physical impediment to consummation (*x*).

On a petition for alimony, a wife has not an absolute right to cross-examine her husband. The registrar is entitled to read the evidence taken on affidavits beforehand, instead of doing so in the presence of the parties (*y*).

The cases in which the Divorce Court has allowed the parties to verify their cases wholly by affidavit must have been very few. In former editions of this work three reported cases are mentioned that occurred in the very early days of the Court (*z*). Immediately after follows a list of cases where a similar application was refused (*a*).

But the instances where a petitioner has been allowed to prove his or her case partly by affidavit have not been uncommon.

A petitioner has been allowed to prove by affidavit a marriage where the witnesses to that part of the case

Knowledge of co-respondent as to respondent's marriage; *onus probandi*.
Nullity suit; impotence; inference.

Alimony.
Right of wife to cross-examine husband as to means.

Cases tried on affidavit only.

Cases verified in part by affidavit.

Witnesses at a distance.

See also *Boddy v. Boddy and Grover* (1860), 30 L. J. P. 23.

(*u*) *Lord v. Lord and Lambert*, (1900) P. 297; 69 L. J. P. 54.

(*x*) *B. (otherwise H.) v. B.*, (1901) P. 39; 70 L. J. P. 4.

See also *E. v. E.* (1902), 87 L. T. 149, where the evidence was that the respondent resisted all attempts at consummation for a period of six months. See also *W. v. W.* (1905), L. J. P. 112; 93 L. T. 456.

(*y*) *Sykes v. Sykes*, (1897) P. 306; 66 L. J. P. 162; 77 L. T. 150.

(*z*) *Ling v. Ling and Croker* (1858), 1 S. & T. 180; 27 L. J. P. 58; *Armitage v. Armitage* (1858), 27 L. J. P. 50; *Ford v. Ford* (1867), 36 L. J. P. 86.

(*a*) See *Potts v. Potts* (1858), 1 S. & T. 181; 27 L. J. P. 59; *March v. March* (1858), 2 S. & T. 49; 28 L. J. P. 30; *Lumley v. Victor* (1871), 26 L. T. 141.

resided in Scotland (*b*); the preliminary facts of the cohabitation and separation where he resided in Australia (*c*); and a conviction for bigamy where the witnesses resided at a distance (*d*).

Bigamy in America.
Cases verified in part by affidavit.

In *Battey v. Battey* (*e*), a pauper cause, where the husband was, at the time of the hearing, undergoing a sentence for bigamy in America, a decree *nisi* was made on the oral evidence of the petitioner alone, corroborated entirely by affidavits.

Corroborative evidence supplied by.

In fact it may now be taken that the Court will allow a case to be completed by evidence supplied on affidavit, if the justice of the case requires it, and there is no reason to suspect collusion.

Discovery and inspection.

The Probate, Divorce and Admiralty Division has the same powers as to discovery and inspection as the other divisions of the High Court, by virtue of the Judicature Act, 1873; and leave to administer interrogatories ought not to be refused on the ground that it is plain from the nature of the case that they must necessarily criminate the party interrogated. He may, however, decline to answer (*f*).

Interrogatories.

Discovery to prove adultery.

In *Redfern v. Redfern* (*g*) the Court of Appeal held that discovery ought not to be granted against a litigant in a divorce suit to prove adultery.

(*b*) *M'Kechnie v. M'Kechnie* (1859), 1 S. & T. 550; 28 L. J. P. 31.

(*c*) *Adams v. Adams and Guest* (1873), 29 L. T. 699.

(*d*) *Macartney v. Macartney* (1866), L. R., 1 P. & D. 259; 36 L. J. P. 38; 15 L. T. 193.

(*e*) This case, in which a decree *nisi* was pronounced, January 15th, 1889, was never reported. See further on this point, *Ellam v. Ellam* (1889), 58 L. J. P. 56; 61 L. T. 338; *Burslem v. Burslem* (1893), 67 L. T. 719.

(*f*) *Harvey v. Lovekin* (otherwise *Harvey*) (1884), 10 P. D. 122; 54 L. J. P. 1. It was for a long time doubted whether the Court had power to give leave to administer interrogatories in a suit for nullity. Permission was first given in *Euston v. Smith* (falsely called *Euston*) (1884), 9 P. D. 57.

(*g*) (1891) P. 139; 60 L. J. P. 9; 64 L. T. 68. See also *Schoolcraft v. Schoolcraft and Ruhmoor* (1892), 65 L. T. 794.

One of the most important points for the practitioner to consider in getting up the evidence in a matrimonial action where adultery is charged is the question of how he proposes to identify the parties charged.

Identification of parties, &c. in matrimonial causes.

A very large proportion of the matrimonial actions that are tried are entered as undefended, and a large number of those entered as defended turn out to be undefended when they come to trial, and in an undefended case identification becomes of the last importance, for until it is fully satisfied of the identity of the party charged with the person whose adultery is proved, the Court will not grant a decree *nisi* for the dissolution of a marriage.

In an undefended suit for nullity on the ground of impotence, although the identity of both parties has been proved in the registry at the time of the medical examination, the identity of the party not appearing must be proved again in open Court (*h*).

Nullity suit.

In the first place, beware of photographs, the never-failing stumbling-block of the inept practitioner, for the Court will be satisfied with nothing short of the very best evidence of identity that can be got.

Best evidence must be got.

Every possible attempt must be first made to enable the witnesses that are to prove the adultery to get a sight of the parties charged, whom they should see in the presence of some person or persons who know them to be the parties named in the pleadings. When every reasonable means have been adopted to bring such face-to-face identification about, and has failed, and *after the Court is fully satisfied that all such reasonable means have been adopted and failed, and not before*, it will consider the question of secondary evidence. Even then the best secondary evidence that can be got must be produced. A photograph, however good, will not suffice; it must be corroborated in some way or other. For example, if a witness has reason to believe that a person whose photo-

How best to identify.

Secondary evidence.

Photograph, identification of.
Corroboration, what amounts to.

(*h*) *H. (otherwise G.) v. G.* (1900), 69 L. J. P. 120.

Identification of parties, &c. in matrimonial causes. — Photograph. graph is produced committed adultery, and that person gave the witness the photograph accompanied by a letter, or wrote something on the back, or on any other paper in the presence of the witness, and the petitioner or some other credible witness is in a position to swear "That is the respondent's photograph, and that is the respondent's handwriting," on proof of the impracticability of personal identification, such evidence would almost always be accepted by the Court.

Photograph. Again, where a photograph is produced which is sworn to be that of a party charged with adultery, and the witnesses called to prove the adultery identify the photograph on oath, such identification might, in the absence of the possibility of better evidence, be established by showing that the original of the photograph was possessed of some article sworn to be the property of the party charged. Another mode of proving identity by secondary evidence

Handwriting. is by means of handwriting alone; but it must always be remembered that the question of identification is an inference of fact to be decided by a Court upon the circumstances of each particular case, and if the practitioner will keep before him the maxim that *the Court will be satisfied with nothing less than the best evidence* of identity that he can produce, he will find it of great service to him (*i*). And this rule was laid down in terms by the then President, Sir Gorell Barnes, in the case of *Frith v. Frith and Paice* (*k*), the head-note to which is: "In matrimonial cases, except under very special circumstances, the Court will not act upon identification by a photograph only."

Ecclesiastical Courts.

In the Ecclesiastical Courts the practice prevailed of ordering a respondent to attend and be confronted with

(*i*) The following cases as to identity are cited (amongst others) in former editions of this work: *Rooker v. Rooker and Newton* (1863), 33 L. J. P. 42;

3 S. & T. 526; *Harris v. Harris and Milton* (1870), L. R., 2 P. & D. 77; 39 L. J. P. 86.

(*k*) (1896) P. 74; 65 L. J. P. 53.

the witnesses for the purpose of identification (*l*), and in a nullity suit such an order has been made by the Divorce Court (*m*).

Identification of parties, &c. in matrimonial causes.

But the Court has held it had no such power in a suit for dissolution (*n*), though a respondent who was out of time has been allowed to appear and defend on condition of allowing herself to be confronted with the witnesses for the petitioner (*o*). And in another case, where a co-respondent charged a petitioner with adultery, the Court ordered them both to attend the trial for the purpose of being identified (*p*).

Decree of confrontation.
Ibid. in Divorce Court.

On the trial of all matrimonial actions, including those for nullity of marriage, the first step is to prove the *factum* of a marriage. When the marriage to be proved is English this is usually done in the following manner:—A certified copy of the marriage certificate is filed with the papers in the registry. When the case is called on for trial, this copy is handed up to the judge, and the petitioner—who is usually the first witness—states on oath that he or she was married to the respondent at such and such time and place, and the marriage is then taken as proved.

Proof of marriage.

When English.

When the marriage to be proved is foreign—that is, when it was celebrated out of England proper—it is usually proved by the production of any documentary evidence there may be concerning it, the evidence of one of the parties to it, with, if necessary, the addition of some

When foreign.

(*l*) *Searle v. Price* (falsely called *Searle*) (1816), 2 Hagg. Con. C. 192.

(*m*) *Enticknap v. Rice* (falsely called *Enticknap*) (1865), 4 S. & T. 136; 34 L. J. P. 110; 13 L. T. 211.

(*n*) *Hooke v. Hooke* (1858), 4 S. & T. 236; 28 L. J. P. 29.

(*o*) *Hindmarsh v. Hindmarsh and Hussey* (1865), L. R., 1 P. & D. 24; 35 L. J. P. 31. See also *Lloyd v. Lloyd* (1866), L. R., 1 P. & D. 222.

(*p*) *Sykes v. Sykes and Smith* (1868), 38 L. J. P. 12; 19 L. T. 611.

Proof of marriage.

Channel Islands.

Evidence of marriage.

Presumptive proof.

Reputation.
Cohabitation.

Presumption of marriage from cohabitation.
1904.

Gretna Green.

Presumption as to registration of chapel and presence of registrar.

expert evidence of its being a valid marriage according to the law of the place of its celebration (*q*).

Evidence of the validity of a marriage in the Channel Islands when not celebrated in Church is necessary (*r*).

It is not impossible to establish the *factum* of a marriage, even though the certificate of registry may not be forthcoming; neither is it necessary in the first instance to give evidence of the regular publication of banns, or of the regularity of the licence. The presumptive proofs of marriage have not been taken away by the Marriage Acts, and—in the absence of better evidence—a marriage may be and often has been proved by presumptive evidence of marriage, reputation and cohabitation.

There is a presumption of law in favour of a valid marriage, which arises, unless the contrary is clearly proved, when a man and woman are shown to have lived together as man and wife for a long time (*s*).

Where the only evidence of the marriage was that the petitioner and respondent had, in May, 1850, left England together for the purpose of being married at Gretna Green, that they shortly returned and stated that they had been married, and lived together for many years as man and wife, it was held sufficient (*t*).

Evidence that a woman was married in a Roman Catholic chapel, according to the rites of the Church, to a person with whom she afterwards lived as his wife, is *primâ facie* evidence sufficient to show a valid marriage,

(*q*) *Bates v. Bates and Others*, (1907) P. 333.

(*r*) *Westlake v. Westlake* (otherwise *Williams*), (1910) P. 167; 79 L. J. P. 36; 102 L. T. 396.

(*s*) *Shepherd, In re, George v. Thyer*, (1904) 1 Ch. 456; 73 L. J., Ch. 401; 90 L. T. 249. See also the following cases: *Northey v. Cock* (1824), 2 Add.

294; *Reed v. Passer and Others* (1795), 1 Peake Ca. 305; *St. Devereux v. Much Dewchurch* (1762), 1 Wm. Bl. 367; *Kay v. Duchesse de Pienne* (1811), 3 Camp. 123; *Birt v. Barlow* (1779), 1 Doug. 171.

(*t*) *Patrickson v. Patrickson* (1865), L. R., 1 P. & D. 86; 35 L. J. P. 48; 13 L. T. 567.

under 6 & 7 Will. 4, c. 85, as the law will presume that the chapel was registered and the registrar present as required by that Act (*u*). Proof of marriage.

Upon an indictment for bigamy it was proved that the first marriage was solemnized, not in the parish church of the parish, but in a chamber in a building a few yards from the church, while the church was under repair. It was further proved that divine service had several times been performed in the building in question: Held, that the building must be presumed to have been licensed, and therefore the first marriage was valid (*x*). *Omnia præsumuntur rite acta.*

Documents admissible in Ireland without proof of seal, stamp, or signature, &c., are similarly admissible in England (*y*). The statutes 8 & 9 Vict. c. 113, and 14 & 15 Vict. c. 5, do not apply to Scotland (*z*). Certain non-parochial registers of births, baptisms, deaths, burials and marriages, are made evidence, either by producing them, or certified extracts from them, upon giving the opposite party previous notice of the intention to use them (*a*). Irish documents: how proved in England.
Non-parochial registers.

Since the Marriage Acts do not extend to places abroad, a marriage celebrated abroad according to the law of the place is valid, as respects the forms and solemnities, though the ability to contract a marriage is regulated by the law of the country where the parties are domiciled (*b*). But it must be celebrated according to the form of the place where it takes place; otherwise it is illegal (*c*). Marriages celebrated abroad.
Lex loci.

(*u*) *Sichel v. Lambert* (1864), 33 L. J., C. P. 137; 15 C. B., N. S. 781; 9 L. T. 687. See also *R. v. Manwaring* (1856), Dears. & B. C. C. 132; 7 Cox, C. C. 192; 26 L. J., M. C. 10.

(*x*) *Reg. v. Cresswell* (1876), L. R., 1 Q. B. D. 446; 45 L. J., M. C. 77; 33 L. T. 760.

(*y*) 14 & 15 Vict. c. 99, s. 10.

(*z*) *Ib.* s. 18, and 8 & 9 Vict. c. 113, s. 5.

(*a*) 3 & 4 Vict. c. 92.

(*b*) *Scrimshire v. Scrimshire* (1752), 2 Hag. Con. C. 395; *Conelly v. Conelly* (1850), 2 Rob. 251; *Brook and Others v. Brook and Others and Att.-Gen.* (1861), 9 H. L. Cas. 193; 4 L. T. 93.

(*c*) *Kent v. Burgess* (1840), 11 Sim. 361; 10 L. J., Ch. 100; 5 Jur. 166; *Lacon v. Higgins* (1822), 3 Stark. N. P. C. 178; *Middleton v. Janvrin (falsely calling herself Middleton)* (1802), 2 Hag. Con. C. 443.

Proof of marriage.

Where no ceremony required.

And where “mere cohabitation of a man and woman who proclaim themselves and are received in society as man and wife constituted in the eye of the law a valid marriage,” evidence of such cohabitation, and of the parties having been so received, was held sufficient to prove a valid marriage (*d*).

Marriage by repute.

In Scotland cohabitation as man and wife constitutes a valid marriage, which is termed a marriage by repute. The law of habit and repute, however, is not peculiar to Scotland; although in some countries where this form of marriage is recognized the evidence to establish it must be stronger (*e*).

In Scotland.

A man formed an illicit connexion with a woman in London: he subsequently moved with her to Glasgow, where they lived together for a year and a half. He introduced her to his family, and acknowledged her as his wife: they afterwards went separately to America, and lived separately for more than thirty years, she resuming her maiden name:—Held, that the marriage was valid and not affected by the short duration of the cohabitation or the subsequent separation (*f*).

Written declaration of marriage *de præsenti*.

It was held in a Scotch case by the House of Lords that a written declaration of marriage *de præsenti*, signed by both, and delivered by the man to the woman, conclusively establishes the contract (*g*).

Evidence of *lex loci*.

It is necessary in these cases to give some evidence of the law of the State where the marriage takes place. This is done by the evidence of some person well acquainted with the law as to which the Court desires to be informed. It is usual to have recourse to some official or professional witness, such as an attaché or consul, or a

(*d*) *Rooker v. Rooker and Newton* (1863), 3 S. & T. 526; 33 L. J. P. 42. (*f*) *Hill v. Hibbit* (1870), 25 L. T. 183.

(*g*) *Forster v. Forster* (1872), L. R., 2 H. L. (Sc.) 244.

(*e*) *Campbell v. Campbell* (1867), L. R., 1 H. L. (Sc.) 182.

professional lawyer, competent to practise before the tribunals of such State. But in any case only the evidence of an expert will be accepted. Proof of marriage.

An expert giving evidence as to foreign law may refer to foreign law-books to refresh his memory, or to correct or confirm his opinion; but the law itself must be taken from his evidence (*h*). Expert may refer to law-book.

The Jewish law has been allowed to be proved *ex necessitate* by persons in trade (*i*); and a Roman Catholic vicar apostolic in England admitted to prove the modern marriage law of the Church of Rome in Italy (*k*); a French vice-consul allowed to prove the French marriage law by production of a printed edition of the "Code Civil," and by his own testimony; and a merchant proved that, by the law of Chili, a book was kept for the registration of marriages (*l*). Jewish law.
Italian law.
French law.
Chili.

In the latter case, a document was held admissible under 14 & 15 Vict. c. 99, s. 14, which purported to be an extract from a register of marriages in Chili, and to be signed by the curate-rector of the church where it was solemnized.

And where it was shown that registers of marriage were kept at Lisle before the first Revolution, by official authority, and were authentic documents, copies of the documents were admitted (*m*). Lisle.

A certificate of a marriage in a foreign country, not purporting to be a copy of an entry in the registry of marriages kept by the law of that country, but only containing a reference to that registry, was not received as Foreign country.

(*h*) *Sussex Peerage Case* (1844), 11 Cl. & F. 85; 8 Jur. 793. See also "Roscoe's Nisi Prius"; "Taylor on Evidence"; "Best on Evidence."

(*i*) *Lindo v. Belisario* (1795), 1 Hag. Con. C. 216.

(*k*) *Sussex Peerage Case*, *supra*.

(*l*) *Abbott v. Abbott and Godoy* (1860), 29 L. J. P. 57.

(*m*) *Biddulph v. Lord Camoys*, not reported, mentioned by Keating, J., in *Abbott v. Abbott and Godoy*, *supra*, at p. 58.

Proof of marriage.

evidence of the marriage, although it would be evidence of such marriage in the foreign Courts (*n*).

Where in a suit for dissolution of marriage it appeared that the petitioner and respondent had lived together for five years in Virginia, and were received in society as man and wife; that by the law in force in Virginia, when cohabitation began, no religious ceremony was necessary to the validity of a marriage, nor was any registry of marriages required to be kept; and that in consequence of war in Virginia the record of any religious ceremony which might have taken place could not now be obtained:—Held, there was sufficient proof of the marriage (*o*).

Where no register is kept.

Scotch registers.

Irish registers.

Marriages in India.

Marriages in Ireland. 1900.

India.

British colonies.

As to registers kept and made evidence in Scotland, see 17 & 18 Vict. c. 80; extracts made evidence, section 58; and 19 & 20 Vict. c. 96; and in Ireland, 7 & 8 Vict. c. 81. As to registration of marriages celebrated in India, see 14 & 15 Vict. c. 40, and the Indian Christian Marriage Act, 1872.

A certificate purporting to be an entry in a church register in Ireland, signed and certified as correct by the clergyman of the parish, is sufficient to prove a valid marriage in Ireland (*p*).

The marriages of British subjects in India, and most of the British colonies and settlements, are governed by the English law as it existed before the 26 Geo. 2, except where it is varied by the law of the particular colony. And marriages of British subjects in British colonies are governed by the common law of England, unless otherwise enacted by the Imperial legislature or that of the colony; and evidence of the solemnization by a clergyman of the

(*n*) *Finlay v. Finlay and Newton* (1863), 3 S. & T. 526; *Rudall* (1862), 31 L. J. P. 149. 33 L. J. P. 42.

See also *Ratcliffe v. Ratcliffe and Anderson* (1859), 1 S. & T. 467. (*p*) *Whitton v. Whitton*, (1900) P. 178; 69 L. J. P. 126.

(*o*) *Rooker v. Rooker and See also Wallace v. Wallace* (1896), 74 L. T. 253.

Church of England, according to the rites of that Church, and of cohabitation, was held to be sufficient proof of a marriage between British subjects in Norfolk Island, then a British penal settlement (*q*).

Proof of marriage.

Norfolk Island.

And a marriage solemnized between two British subjects in a British colony, according to the rites and ceremonies of the Church of England, by one of its ministers, who is the officiating minister of the parish where the ceremony took place, is *primâ facie* a valid marriage (*r*).

British colony.

Some doubts having arisen as to the validity of marriages by members of the Church of Scotland celebrated in the East Indies by ministers of the Church of Scotland, the 58 Geo. 3, c. 84, was passed for the purpose of giving them validity; by section 2, certificates in duplicate are directed to be made immediately on the solemnization of the marriage by the minister, one to be given to the parties, the other to be transmitted to the secretary of the particular presidency where the marriage takes place. Copies of the latter certificate would be evidence under 8 & 9 Vict. c. 113, and 14 & 15 Vict. c. 99. The whole law of marriages in India is now amended (though the 58 Geo. 3, c. 84, is still in force) by 14 & 15 Vict. c. 40, under which marriages are now registered, and the evidence of marriages by copies of the registers is assimilated to the evidence (under 6 & 7 Will. 4, c. 86) of marriages in England.

Scotch clergymen in East Indies.

58 Geo. 3, c. 84, s. 2.

Indian registers.

8 & 9 Vict. c. 113; 14 & 15 Vict. c. 99, 14 & 15 Vict. c. 40.

6 & 7 Will. 4, c. 86.

By the Indian Christian Marriage Act, 1872, ss. 80, 81, a certified copy of every such marriage is sent over to this country and preserved at the India Office, the production of which is a sufficient proof of such marriage (*s*).

Indian marriage, proof of. 1899.

By the Evidence (Colonial Statutes) Act, 1907 (7 Edw. 7, c. 16) (*t*), section 1:—(1) “Copies of Acts,

Evidence (Colonial Statutes) Act, 1907.

(*q*) *Limerick v. Limerick* (1863), 4 S. & T. 252; 32 L. J. P. 92. (*s*) *Westmacott v. Westmacott*, (1899) P. 183; 68 L. J. P. 63; 80 L. T. 632.

(*r*) *Ward v. Day* (1846), 1 Robert. 759. (*t*) See Appendix (p. 762).

Proof of
marriage.

Proof of
statutes of
British
possession.

Jews and
Quakers.
26 Geo. 2,
c. 33;
4 Geo. 4,
c. 76;
61 & 62 Vict.
c. 58.

6 & 7 Will. 4,
c. 85;
3 & 4 Vict.
c. 72;
10 & 11 Vict.
c. 58.

Colonial
marriage;
expert
evidence.

Adultery,
proof of.

ordinances, and statutes passed (whether before or after the passing of this Act) by the Legislature of any British possession, and of orders, regulations, and other instruments issued or made, whether before or after the passing of this Act, under the authority of any such Act, ordinance or statute, if purporting to be printed by the Government printer, shall be received in evidence by all courts of justice in the United Kingdom without any proof being given that the copies were so printed."

Jews and Quakers are excepted from the Marriage Acts 26 Geo. 2, c. 33, and 4 Geo. 4, c. 76, and also from the Marriage Act, 1898 (61 & 62 Vict. c. 58); these marriages must therefore be proved in the same manner as marriages before that Act. But now notice must be given to the registrar of any such intended marriage, and a certificate issued by the registrar, which, with evidence of identity, will be proof of the *factum* of the marriage: 6 & 7 Will. 4, c. 85; 3 & 4 Vict. c. 72; and 10 & 11 Vict. c. 58. But such marriages must be celebrated between parties who are both Jews or both Quakers: 6 & 7 Will. 4, c. 85.

Where the only acknowledged expert in the marriage law of Hong Kong refused to give evidence except at a fee higher than the petitioner could afford to pay, the Court accepted an affidavit of a former governor as to the legality of a marriage (*u*).

Where there was a practical difficulty in adducing the usual evidence, the Court allowed a colonial marriage to be proved by a member of the English Bar, who satisfied the Court that he was well acquainted with the marriage law of the colony (*x*).

If a witness, who is called to prove adultery with one of the parties to a suit, does not claim protection under the Evidence Further Amendment Act, 1869, his evidence is

(*u*) *Cooper King v. Cooper King*, (1900) P. 65; 69 L. J. P. 33.

(*x*) *Wilson v. Wilson*, (1903) P. 157; 72 L. J. P. 53; 89 L. T. 77.

admissible, and counsel cannot exclude it (*y*); but such a witness must first be asked whether he is willing to give evidence.

A witness cannot be cross-examined as to any act of adultery respecting which he or she has not been examined in chief, although such adultery may not be a question in issue in the cause (*z*).

Where a wife gave evidence of her own adultery in support of her pleas of connivance and conduct condoning, she may be cross-examined as to the time and circumstances of such adultery (*a*).

It is not easy to prove adultery by direct evidence; therefore evidence of familiarities between the parties and of facts showing that they had had opportunities for criminal intercourse and leading to the conclusion that such intercourse had actually taken place between them, was always admitted in the Ecclesiastical Courts (*b*).

Evidence given by paid witnesses, called *testes lupanares*, and accomplices was looked on with suspicion in the Ecclesiastical Courts (*c*), and since the institution of the Divorce Court, where, in support of a petition by a wife for a judicial separation, direct evidence was given of several acts of adultery committed by the husband, in consequence of the improbability of that evidence, of the

Proof of adultery.

32 & 33 Vict. c. 68, s. 3.

Parties as witnesses, protection of.

Evidence of parties as to. Cross-examination of party charged.

Evidence of acts of familiarity.

Paid witnesses and accomplices in Ecclesiastical Courts.

(*y*) *Hebblethwaite v. Hebblethwaite* (Queen's Proctor intervening) (1869), L. R., 2 P. & D. 29; 39 L. J. P. 15; 22 L. T. 732.

(*z*) *Babbage v. Babbage and Manning* (1870), L. R., 2 P. & D. 222; and see *Allen v. Allen and Bell*, (1894) P. 248; 63 L. J. P. 120; 70 L. T. 783, as to the right of a co-respondent to cross-examine a respondent who has given evidence against him, and *vice versa*.

(*a*) *Ruck v. Ruck and Croft*,

(1911) P. 90.

(*b*) See as to evidence of adultery in the Ecclesiastical Courts, *Grant v. Grant* (1839), 2 Curt. 16; *Davidson v. Davidson* (1856), 1 Dea. & Sw. 132; *Hamerton v. Hamerton* (1828), 2 Hagg. 8; *Weatherley v. Weatherley* (1854), 18 Jur. 882; *Durant v. Durant* (1828), 1 Hagg. 748; *Williams v. Williams* (1798), 1 Hagg. Con. C. 299; *Fausset v. Fausset* (1849), 7 No. of Cas. 74.

(*c*) *Ciocchi v. Ciocchi* (1854), 18 Jur. 194.

Proof of
adultery.

discrepancies in the statements of the witnesses, and of the improper manner in which it had been got up by the private detectives employed by the petitioner, the Court refused to act upon it (*d*).

Venereal
disease.

It was held in the Ecclesiastical Courts that venereal disease was uncertain evidence, as it "is consistent with the adultery of the husband, with the wife's adultery, and with accidental communication of the disease" (*e*).

In a recent case it was held that it is sufficient for the wife to prove that she was infected by the husband, and it is then for him to prove that the disease was communicated in such circumstances as not to amount to legal cruelty (*f*).

Woman going
to brothel.

And also that the circumstance of a woman going to a brothel furnishes conclusive proof of adultery (*g*), since it would be almost impossible for a woman to go to such a place but for a criminal purpose (*h*).

Wife visiting
adulterer
under sus-
picious cir-
cumstances.

And where a wife visited a single man at his house, and the windows were closed, and there were letters which could not otherwise be explained, the Ecclesiastical Court held adultery proved (*i*).

But these cases were tried in days when the parties to the suit were not competent to give evidence.

Insufficient
evidence.

Where the evidence of adultery charged with a servant girl was, that the husband had been seen to kiss her once, and that a neighbour had heard noises at night in the servant's room: on the other side a witness, who had lived in the same house some time, stated that the respondent

(*d*) *Sopwith v. Sopwith* (1859), 4 S. & T. 243. See also *Ginger v. Ginger* (1865), L. R., 1 P. & D. 37; 34 L. J. P. 9.

(*e*) *Collett v. Collett* (1838), 1 Curt. 678; *Popkin v. Popkin* (1794), 1 Hagg. 765, note; *King v. King* (1847), 5 No. of Cas. 252.

(*f*) *Browning v. Browning*, (1911) P. 161.

(*g*) *Williams v. Williams* (1798), 1 Hagg. Con. C. 303; *Best v. Best* (1823), 1 Add. 436.

(*h*) *Eliot v. Eliot* (1775-1776), cited 1 Hagg. Con. C. 302.

(*i*) *Ricketts v. Taylor* (1799), cited 1 Hagg. Con. C. 303.

and the servant always slept in their own rooms: the Court held the adultery not to be proved (*j*).

Proof of adultery.

A husband and wife executed a deed, which provided, that "in case either party shall hereafter commence or prosecute any proceeding against the other, in respect of any cause of complaint which may hereafter arise, no offence or misconduct which has been committed or permitted before the execution of these presents, and no act, deed, neglect or default of either in relation to any such offence or misconduct, shall be pleaded or alleged by either party, or be admissible in evidence." The wife was subsequently guilty of adultery with co-respondent, and the husband instituted a suit for dissolution of marriage by reason of such adultery:—Held, that evidence of familiarities between the wife and co-respondent, prior to the separation, was admissible as tending to throw light on the subsequent adultery (*k*).

Deed covenanting not to prove previous misconduct in subsequent proceeding.

Evidence of acts prior to deed of separation.

In the case of *Robinson v. Robinson and Lane* (*l*), Sir Alexander Cockburn, C.J., said: "But as this Court" (*i.e.*, the Divorce Court) "is not a Court of ecclesiastical jurisdiction, nor bound in cases of divorce *à vinculo* by rules of merely ecclesiastical authority, it is at liberty to act, and bound to act, on any evidence legally admissible, by which the fact of adultery is established; and if therefore there is evidence, not open to exception, of admissions of adultery by the principal respondent, it would be the duty of the Court to act on such admissions, *although there might be a total absence of all other evidence to support them*. . . . The admission of a party charged

Admissions and confessions.

(*j*) *Topper v. Topper* (1869), 38 L. J. P. 36; 20 L. T. 279.

(*k*) *Harris v. Harris and Woodden* (1872), 41 L. J. P. 61; 27 L. T. 428.

(*l*) (1858), 1 S. & T. 362, at p. 393; 27 L. J. P. 91. See also *Getty v. Getty*, (1907) P. 334; 76

L. J. P. 158; 98 L. T. 60. See also as to admissions of the parties in a proceeding for a divorce *a vinculo* before the House of Lords under the old system, *D'Oyley's Case*, Sess. 1830, Macq. H. of L. 654; *Lord Ellenborough's Case*, *Ib.* 655.

Proof of
adultery.

Admissions
and confes-
sions.

Evidence
against party
alone.

Possible effect
of wife's
admissions.

Identity.

King's
Proctor
intervening.

Petitioner
failing to
come forward
to deny
charge.

Visiting card.

Nullity.

with a criminal or wrongful act has at all times, and in all systems of jurisprudence, been considered as most cogent and conclusive proof; and if all doubt of its genuineness and sincerity be removed, we see no reason why such a confession should not, as against the party making it, have full effect given to it. . . ."

But in the same case it was held that this confession is evidence only against the party making it (*m*).

So a petitioner may obtain a decree *nisi* for the dissolution of his marriage on his wife's confession of adultery with the co-respondent and yet have to pay the co-respondent's costs, if there is no other evidence against him (*n*).

As we have already seen, the identity of the parties must be proved, and in undefended cases it is of the last importance to prove this satisfactorily. In defended cases the parties can often be identified in the Court itself.

Where the only evidence was that a man, calling himself by the name, and using the card, of the petitioner, had committed fornication, but full particulars of the charge had been given, and the petitioner had not come forward to deny it; the Court held there was sufficient evidence of identity (*o*).

Any evidence is admissible in a suit for nullity which

(*m*) See also *Williams v. Williams and Padfield* (1865), L. R., 1 P. & D. 29; 35 L. J. P. 8; 13 L. T. 610, where a husband obtained a divorce solely on the admissions of his wife; and *Le Marchant v. Le Marchant and Radcliff* (1876), 45 L. J. P. 43; 34 L. T. 367, where the divorce was obtained on the admissions of the wife and the co-respondent.

(*n*) For cases in which the wife's confessions have been used in evi-

dence against the party charged, see *Payne v. Payne, Rodway and Eddels* (1888), 60 L. T. 238; *Gill v. Gill* (1889), 60 L. T. 712; *Cornish v. Cornish* (1890), 15 P. D. 131; 59 L. J. P. 84; 62 L. T. 667; *Bagot v. Bagot* (1890), 62 L. T. 612.

(*o*) *Hulse v. Hulse and Taver-*
nor (Queen's Proctor interven-
ing) (1871), 4 S. & T. 232; L. R.,
2 P. & D. 357; 41 L. J. P. 19;
25 L. T. 764.

tends to throw light on the case set up by the petitioner; evidence is, therefore, admissible as to disputes between the petitioner and the respondent during their cohabitation, although the only questions in dispute are the respondent's impotency and the consummation of the marriage (*p*). Evidence.

By Order XXXVII., Rule 35, of the Rules of the Supreme Court, "Any person who would under the circumstances alleged by him to exist become entitled, upon the happening of any future event, to any honour, title, dignity, or office, or to any estate or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, may commence an action to perpetuate any testimony which may be material for establishing such right or claim." Suit to perpetuate testimony.
Ord.
XXXVII.
r. 35.

In *Jackman v. Jackman and Willoughby* (*q*) it was held that a petitioner might, as part of the case opened by him, give his own evidence and call his witnesses in answer to countercharges made by the respondent against him, or that he might in the alternative reserve his answer to the charge until the respondent's witnesses in support of it had been examined, but that he was not entitled to divide his case by giving his own evidence in the opening, and afterwards calling his witnesses in reply to the respondent's case. Rebutting evidence.

Where some evidence was called to show that the respondent and co-respondent had made admissions in the presence of several persons, and that the landlady of the house had made charges against the co-respondent, to which he made no reply: the Court adjourned the case that the landlady might be called (*r*). Admissions of respondent and co-respondent in presence of third persons.

(*p*) *X. v. Y.* (1865), 34 L. J. L. J. P. 72; 60 L. T. 936.

P. 81.

(*r*) *White v. White and*

(*q*) (1889), 14 P. D. 62; 58 *Jerome* (1890), 62 L. T. 663.

Incestuous
adultery.

A criminal Court had acquitted a respondent on a charge of carnally knowing his own daughter, but convicted him of the attempt. The Divorce Court, notwithstanding the certificate of conviction, allowed evidence to be given to prove that incestuous adultery had, in fact, taken place (*s*).

Going behind
certificate of
conviction.

Application
for settlement
or allowance
in suit for
restitution;
evidence as to
conduct of
petitioner to
respondent
during co-
habitation.

On an application for a settlement or allowance made in an undefended suit for restitution, it is competent for the applicant to tender evidence as to the conduct of the other party during cohabitation (*t*).

Upon a re-hearing, the Court refused to take notice of evidence given at the former hearing, and refused to pronounce a decree unless a witness who negatived adultery was subpoenaed (*u*).

Re-hearing
evidence at
former trial.
Decree for
dissolution in
previous suit.

A respondent in a suit for dissolution of marriage had been co-respondent in a previous suit. The decree in the former suit stated that the jury found the respondent had committed adultery with the co-respondent, and that the latter had been condemned in costs. As, however, the decree did not in terms state that there had been any finding that the co-respondent had committed adultery with the respondent, the Court, in the subsequent suit, refused to accept it as evidence that he had previously committed adultery (*x*).

Confidential
communica-
tions by
husband to
wife, and
vice versâ.

By section 3 of the Evidence Amendment Act, 1853 (16 & 17 Vict. c. 83), "No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband

(*s*) *Virgo v. Virgo* (1893), 69 L. T. 460.

(*t*) *Swift v. Swift*, (1891) P. 129; 60 L. J. P. 14; 63 L. T. 711.

(*u*) *Chambers v. Chambers* (1889), 60 L. T. 514.

(*x*) *Ruck v. Ruck*, (1896) P. 152; 65 L. J. P. 87. And see as to using the judges' notes in a matrimonial suit before the House of Lords on an Irish Divorce Bill, *Griffin's Divorce Bill*, (1896) A. C. 133; *Sinclair's Divorce Bill*, (1897) A. C. 469.

during the marriage." Therefore, where a wife petitioner called as a witness the husband of a lady with whom she alleged that her husband had committed adultery, the Court under the above statute refused to allow him to be asked any questions as to certain statements alleged to have been made by his wife to him, or to compel him to produce a certain letter alleged to have been written to him by her (*y*).

It has been held that, upon a second trial of the same issue, the judge's notes of deceased witnesses who were examined on the first trial are not admissible in evidence, except by consent (*z*).

Second trial.
Judge's notes
—deceased
witnesses.

The Court will grant a new trial or re-hearing where fresh evidence has been obtained since the original trial or hearing, if it is of opinion that such evidence would lead to a different result (*a*).

Fresh
evidence.
Re-hearing.

Fresh evidence will not, as a general rule, be received on appeal from justices under the Summary Jurisdiction Act, 1895. The note taken by the justices' clerk will be accepted as a *primâ facie* complete statement of what took place. If such note is incomplete, it may be supplemented by an affidavit as to what took place in the Court below, but not as to other facts (*b*).

Appeal from
justices.
Fresh
evidence.

Fresh evidence means evidence which has not come to the knowledge of the party wishing to call it, at the time of the hearing, or evidence which he could not then have called (*c*).

It is essential that clerks to justices should take careful notes of the evidence, or depositions, and of the justices' depositions in Court below.

Depositions
in Court
below.

(*y*) *Cowley v. Cowley* (1897), 68 L. J. P. 116; 81 L. T. L. J., N. C. 49. 494.

(*z*) *Conradi v. Conradi, Wor-* (*b*) *Snape v. Snape* (1898), 62
rall and Way (the Queen's Proc- J. P. 153.

tor intervening) (1868), L. R., 1 P. & D. 514; 37 L. J. P. 55. (*c*) *Johnson v. Johnson*, (1900)
P. 19; 69 L. J. P. 13; 81 L. T.

(*a*) *Taylor v. Taylor and Darg* 791.

reasons for arriving at their decision. In case of appeal correct copies of such notes should be furnished to the judges of the Divisional Court (*d*).

Evidence of means.

It was held on appeal from justices that an offer made by the husband to allow his wife 1*l.* a week was some evidence of means (*e*). See further as to "Evidence," Part II., tit. "Evidence" (p. 604).

(*d*) *Robinson v. Robinson*, supplied for the use of the judge: (1898) P. 153; 67 L. J. P. 77; *Walton v. Walton*, (1900) P. 78 L. T. 392; *Cobb v. Cobb*, 147; 69 L. J. P. 54; 82 L. T. (1900) P. 145; 69 L. J. P. 52; 627.

82 L. T. 626. See also *Wenham v. Wenham* (1906), 95 L. T. 548. (*e*) *Walton v. Walton* (1900), 64 J. P. 264.

Two copies of the notes should be

A TABLE OF KINDRED AND AFFINITY (*a*).



A man may not marry his—

1. Grandmother.
2. Grandfather's wife.
3. Wife's grandmother.
4. Father's sister }
5. Mother's sister } (i.e., *aunt by blood*).
6. Father's brother's wife }
7. Mother's brother's wife } (*uncle's wife*, i.e., *aunt by affinity*).
8. Wife's father's sister }
9. Wife's mother's sister } (*wife's aunt*).
10. Mother.
11. Step-mother.
12. Wife's mother (*mother-in-law*).
13. Daughter.
14. Wife's daughter (*step-daughter*).
15. Son's wife (*daughter-in-law*).
16. Sister.
17. ~~Wife's sister~~ (*b*) }
18. Brother's wife } (*sister-in-law*).
19. Son's daughter }
20. Daughter's daughter } (*granddaughter*).
21. Son's son's wife (*son's daughter-in-law*).
22. Daughter's son's wife (*daughter's daughter-in-law*).
23. Wife's son's daughter (*step-son's daughter*).
24. Wife's daughter's daughter (*step-daughter's daughter*).
25. Brother's daughter }
26. Sister's daughter } (*niece*).
27. Brother's son's wife }
28. Sister's son's wife } (*nephew's wife*).
29. Wife's brother's daughter }
30. Wife's sister's daughter } (*niece by affinity*).

(*a*) From Hammick's "Marriage Laws of England," second edition, pp. 35, 36.

(*b*) This has been altered by the Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. 7, c. 47), which legalized marriage with a deceased wife's sister—including a sister of the half-blood.

A woman may not marry her—

1. Grandfather.
2. Grandmother's husband.
3. Husband's grandfather.
4. Father's brother } (*uncle by blood*).
5. Mother's brother } (*uncle by blood*).
6. Father's sister's husband } (*aunt's husband, i.e., uncle by affinity*).
7. Mother's sister's husband } (*aunt's husband, i.e., uncle by affinity*).
8. Husband's father's brother } (*husband's uncle*).
9. Husband's mother's brother } (*husband's uncle*).
10. Father.
11. Step-father.
12. Husband's father (*father-in-law*).
13. Son.
14. Husband's son (*step-son*).
15. Daughter's husband (*son-in-law*).
16. Brother.
17. Husband's brother } (*brother-in-law*).
18. ~~Sister's husband~~ (c) } (*brother-in-law*).
19. Son's son } (*grandson*).
20. Daughter's son } (*grandson*).
21. Son's daughter's husband (*son's son-in-law*).
22. Daughter's daughter's husband (*daughter's son-in-law*).
23. Husband's son's son (*step-son's son*).
24. Husband's daughter's son (*step-daughter's son*).
25. Brother's son } (*nephew*).
26. Sister's son } (*nephew*).
27. Brother's daughter's husband } (*niece's husband*).
28. Sister's daughter's husband } (*niece's husband*).
29. Husband's brother's son } (*nephew by affinity*).
30. Husband's sister's son } (*nephew by affinity*).

With reference to these prohibitions, it is important to bear in mind :—

1. That the degrees prohibited extend to *all persons related in lineal consanguinity*, that is, in the direct line ascendant and descendant, however far asunder in degree.

2. That relationship of the *half-blood* is of the same effect as relationship of the whole blood.

3. That consanguinity and affinity are contracted "as well by unlawful company of man and woman as by lawful marriage"; therefore it matters not whether the parties are related or connected through lawful wedlock or otherwise: they are equally restricted from intermarriage within the prohibited degrees.

(c) Altered by the Deceased Wife's Sister's Marriage Act (see note (b) on previous page).

4. The *kindred of the husband* are not of affinity to the *kindred of the wife*; and therefore, the husband's brother may marry his brother's wife's sister, that is, two brothers may marry two sisters; so also the husband's son by a former marriage may marry his father's second wife's daughter by a former husband, that is, a father and his son may marry a mother and her daughter.

5. Consanguinity bars marriage to the third degree inclusive collaterally, according to the mode of computation adopted by the civil law, which is the basis of the rule in England. But marriages of relations in the fourth degree (as first cousins), and any subsequent degree, are lawful by the statute of 32 Hen. 8, c. 38 (*d*).

(*d*) Hammick's "Marriage Laws of England," second edition, p. 37.

PART II.



Practice

OF THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION
IN MATRIMONIAL SUITS.

GENERAL OBSERVATIONS.

Matrimonial
causes, how
heard.

MATRIMONIAL Causes, whether for Dissolution of Marriage, Judicial Separation, Nullity or Restitution of Conjugal Rights, are heard before the Court itself, unless an order has been obtained directing a trial by jury, or damages are claimed which must of necessity be assessed by a jury.

Pleadings.
Undefended
causes.

In Undefended Causes, the only documents or pleadings usually required to be filed are—*Petition* and *Affidavit*, *Citation* with *Affidavit of Service*, *Affidavit of Search for Appearance*, *Application for the Registrar's Certificate* with the *Certificate of Marriage*, the *Registrar's Certificate* and *Præcipe setting down the cause*.

Defended
causes.

In Defended Causes, the pleadings of course depend upon the nature of the defence; but in cases where the answer is a simple denial of the charges alleged in the petition, the documents required to be filed are—*Petition* and *Affidavit*, *Citation* (without *Affidavit of Service*), *Appearance* entered, *Answer*, *Application for the Registrar's Certificate* with *Certificate of Marriage*, the *Registrar's Certificate*, *Notice* and *Præcipe* setting down the cause. In more contested cases there are the *Replication* and *other pleadings*, and, if to be tried by a jury, the *Questions*.

Documents,
form of.

All documents should be drawn on good foolscap paper, with a margin, which should be fairly large, on the left-hand side; folded lengthwise, and endorsed with the title of the cause, and a proper description of the contents of such documents.

Heading
or title of.

Forms of headings or titles and endorsements of documents are given, as far as possible, in their proper places in the ensuing pages of this book.

The name and address of the solicitor on the record in the cause should be written at the bottom of the endorsement. Address of solicitor on record.

The names of country solicitors cannot appear as solicitors on the record in matrimonial causes. A London agent must be employed in every case. Country solicitors.

It is a common practice for the London agent to endorse his name and address thus:— London agent.

BROWN & JONES,
225, Coleman Street,
E.C.,

Agents for—

J. ROBINSON,
Norwich,

Solicitor for the Petitioner

[or Respondent, *or as the case may be*].

But this is by no means necessary. The London agent is the only solicitor on the record, and as long as his name and address appear on the papers it is sufficient.

If the party is conducting his case in person, instead of the name of a solicitor he writes the words "in person" at the bottom of the papers, together with an address for service, within three miles of the General Post Office. Petitioner in person.

All proceedings that require filing in matrimonial causes must be taken to Rooms 38, 39, and 41, in the Divorce Registry at Somerset House. Documents, where filed.

By an order dated March, 1896, all fees in divorce proceedings are to be paid by the stamp for the amount being affixed to the document to which it relates when brought in and cancelled by the clerk with the special cancelling date stamp, in the presence of the person handing it in. Stamps.

Stamps and forms may be bought at the Divorce Registry (Room 43).

Divorce
Registry,
situation of.

Entering from the Strand, the proper entrance to this part of the Divorce Registry will be found in the farther corner on the left-hand side.

Document in
foreign
language.
Translation.

Where it is necessary to file a document in a foreign language, a translation certified by a public notary, or some other duly authorized person, should be left with it.

Summonses
to be heard
by registrars
in first
instance.

The following four rules were promulgated in 1875.
In the ensuing pages rules ordering an application to be made to a judge, or, in his absence, to one of the registrars, are so frequently met with, that it is well, as a "general observation," to remind practitioners that in all such cases they must now go to a registrar in the first instance.

"181. All summonses heretofore heard by the registrars of the principal registry of the Court of Probate in the absence of the Judge Ordinary shall hereafter be heard before one or more of the registrars at the principal registry of that Court during the period appointed for the sittings of the Court at Westminster, as well as in the judge's absence."

"182. All rules and regulations in respect to summonses now heard before the Judge Ordinary in Chambers at Westminster shall, so far as the same are applicable, be observed in respect of the summonses heard before one or more of the registrars at the principal registry."

"183. The registrar before whom the summons is heard will direct such order to issue as he shall think fit, or refer the matter at once to the Judge Ordinary."

Appeal to
judge.

"184. Any person heard on the summons objecting to the order so issued under the direction of the registrars may, subject to any order as to costs, apply to the Judge Ordinary on summons to rescind or vary the same."

Practice in Suits for Dissolution of Marriage.

(See ante, Part I., Chap. II. p. 24.)

By rule 1 of the Divorce Court Rules, "Proceedings before the Court for Divorce and Matrimonial Causes shall be commenced by filing a petition."

Commencement of proceedings.

By section 28 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), "Upon any such petition" (*i.e.*, for dissolution of marriage) "presented by a husband the petitioner shall make the alleged adulterer a co-respondent to the said petition, unless on special grounds, to be allowed by the Court, he shall be excused from so doing;"

CO-RESPONDENT.

[The discretion given to the Court by this section to excuse the petitioner from making a co-respondent should be exercised on the principles laid down by or to be gathered from the Act and the rules, and the circumstances of each particular case, and cannot be fettered by any rule of practice. (*Saunders v. Saunders*, (1897) P. 89; 66 L. J. P. 57; 76 L. T. 330—Court of Appeal. See also *Edwards v. Edwards and Wilson*, (1897) P. 316; 67 L. J. P. 1; 77 L. T. 436.) The Court has no right to dismiss a co-respondent from a suit on the ground of delay in prosecuting such suit. The application should be to dismiss the petition. (*Hancock v. Hancock and Smith* (1867), L. R. 1 P. & D. 334; 36 L. J. P. 86.)]

Discretion of Court.

The practice under this section is regulated by rules 4, 5, and 6.

By rule 4, "Upon a husband filing a petition for dissolution of marriage on the ground of adultery, the alleged adulterers shall be made co-respondents in the cause, unless the Judge Ordinary shall otherwise direct."

Co-respondent.

Dispensing with.

[The term "Judge Ordinary" is preserved in the rules, but it should now be read "One of the judges of the Probate, Divorce and Admiralty Division."]

By rule 5, "Application for such direction is to be

Co-respondent.

made to the Judge Ordinary on motion founded on affidavit."

Address of adulterer unknown.

By rule 6, "If the names of the alleged adulterers or either of them should be unknown to the petitioner at the time of filing his petition, the same must be supplied as soon as known, and application must be made forthwith to one of the registrars to amend the petition by inserting such name therein, and the registrar to whom the application is made shall give his directions as to such amendment, and such further directions as he may think fit as to service of the amended petition."

Dispensing with.

[Where a petition charges adultery with a person unknown, leave must be obtained to dispense with naming anyone as co-respondent (*Pitt v. Pitt* (1868), L. R., 1 P. & D. 464; 37 L. J. P. 24; 17 L. T. 671; *Tollemache v. Tollemache* (1858), 28 L. J. P. 2); and this is so although adultery is charged against other persons who have been made co-respondents in the suit. (*Slaytor v. Slaytor*, (1897) P. 85; 66 L. J. P. 97; 77 L. T. 141; see also *Penty v. Penty*, *Johnson and Sabingie* (1882), 7 P. D. 19; 51 L. J. P. 24; 47 L. T. 131.)

Sometimes where there are charges against unknown persons as well as the co-respondent on the record, the Court orders the paragraphs relating to the unknown persons to be struck out. (*Peacock v. Peacock* (1894), 6 R. 656.)

The Court will not dispense with a co-respondent on the affidavit of the petitioner only (*Leader v. Leader* (1863), 32 L. J. P. 136); it must be corroborated by the affidavit of some one who has either assisted in the endeavour to trace the co-respondent, or who can depose as to the facts stated in petitioner's affidavit. (*Jeffers v. Jeffers* (1877), 2 P. D. 90; 46 L. J. P. 80; *Barber v. Barber*, (1896) P. 73; 65 L. J. P. 58.) But upon a motion to dispense with a co-respondent, an affidavit of the petitioner is indispensable, except of course under very special circumstances. (*Drinkwater v. Drinkwater* (1889), 60 L. T. 398.)

Where the alleged adulterer is a foreigner, application should be made to the Court for leave to proceed without citing him as a co-respondent (see *Levy v. Levy and de Romanu*, (1908) P. 256; 77 L. J. P. 95; 99 L. T. 212; and *Baker v. Baker and Dwyer*, (1908) P. 257; 77 L. J. P. 96; 99 L. T. 313); but notice of the proceedings should be given to the foreigner in

order that he may have the opportunity of clearing himself. (See *Boger v. Boger*, (1908) P. 300; 77 L. J. P. 151; 99 L. T. 881.)

Co-respondent.

Where a co-respondent dies whilst the suit is pending, the proper course is to apply by motion to strike his name out of the petition. (*Walpole v. Walpole and Chamberlain*, (1901) P. 86; 70 L. J. P. 23; 84 L. T. 63. See also on the subject of dispensing with a co-respondent, *Grose v. Grose* (1898), 78 L. T. 89; *Nicolas v. Nicolas* (1899), 68 L. J. P. 66; 80 L. T. 422.)]

The affidavit should satisfy the Court that the petitioner has made every reasonable endeavour to ascertain the name of the adulterer and has been unable to do so; and the affidavits should set out what means have been adopted to obtain the required information.

Affidavits in support of motion.

[If the wife has been delivered of a child, which cannot possibly be the petitioner's, he must equally show that he cannot ascertain who the father is (*Hunter v. Hunter and Vernon* (1858), 28 L. J. P. 3); and even if he shows that the wife is leading the life of a common prostitute, he will not be allowed to dispense with making a co-respondent, if he knows the name of any man with whom she has committed adultery. (*Hooke v. Hooke* (1858), 1 S. & T. 183; 27 L. J. P. 61; *Quicke v. Quicke* (1861), 3 S. & T. 419; 31 L. J. P. 28; 5 L. T. 690.) Where the relief sought is on the ground of adultery alleged to have been committed with a man who is alive, and whose name and identity are known to the petitioner, the Court will not excuse the petitioner from making him a co-respondent merely because he cannot obtain sufficient evidence (*Jones v. Jones*, (1896) P. 165; 65 L. J. P. 101; *Cornish v. Cornish* (1890), 15 P. D. 131; 59 L. J. P. 84; 62 L. T. 667), except under very special circumstances. (See *Bagot v. Bagot* (1890), 52 L. T. 612; *Payne v. Payne, Rodway and Eddels* (1888), 60 L. T. 238; *Gill v. Gill* (1889), 60 L. T. 712.)]

By rule 7, "The term 'respondent' where the same is hereinafter used shall include all co-respondents so far as the same is applicable to them."

By rule 219, "In all proceedings before the Court for Divorce and Matrimonial Causes, the petition shall state

PETITION.
Forms of.

Petition.	whether or no there has been any, and if so what, proceedings previous thereto with reference to the marriage in the Divorce Division of the High Court by and on behalf of either of the parties to the marriage."
Previous proceedings.	
Domicil and description of husband to be set out in petition.	And by rule 220, "In all proceedings before the Court for Divorce and Matrimonial Causes, the petition shall state the description of the husband and the place of residence, and the domicil of the parties to the marriage at the time of the institution of the suit."

The following forms of petitions will be found useful as precedents in suits for dissolution of marriage:—

FORM 1.

In the High Court of Justice,
Probate, Divorce and Admiralty Division.
(Divorce.)

To the Rt. Honble. the President of the said Division.
The day of 19 .

Commence-
ment of
petition by
husband.

The petition of Timothy Trowse, smackowner (*see rule 220, supra*), of 125, King Edward's Hill, Yarmouth, in the county of Norfolk, sheweth:—

[It is advisable that all petitions should be headed in this way, because it is the form of heading given in the official copy of the rules.]

[If the petitioner be the husband, paragraphs 1 and 2 should be in the following terms:]

1. That your petitioner was on the day of
19 , lawfully married to Charlotte Trowse, then Charlotte Reedham [spinster or widow, *as the case may be*], at the parish church of , in the county of .

[The place at which the marriage was solemnized must be described with exactness in this paragraph, so if the marriage was not solemnized in the Church of England, but at some

other church or place, substitute "Roman Catholic Church of _____," "Jewish Synagogue," "Register Office," "Consulate," or whatever may be the correct description of the place of worship or other place where the ceremony took place.]

Petition.
Forms of.

2. That after his said marriage your petitioner lived and cohabited with his said wife at divers places and at

[Set forth here, as far as seems in your discretion necessary, all the various addresses at which the parties have lived together. Sometimes it is sufficient to add after the words "at divers places," "and finally at," inserting merely the last address at which the parties cohabited before they finally parted. If addresses are given, they should be set out correctly, as for example, "at 116, Elliot Place, Blackheath, in the county of Kent." If the name of the place, "Blackheath," had already occurred in the petition, the proper form would be "at 116, Elliot Place, Blackheath, aforesaid," or supposing the name of the county, "Kent," had already occurred in the petition, but not the name of the place, "Blackheath," which would be the case if the marriage had taken place at "Maidstone, in the county of Kent," then the proper form would be "at 116, Elliot Place, Blackheath, in the said county of Kent."]

and that your petitioner and his said wife have had issue of their said marriage seven children, five of whom are still living; that is to say, John, born April 2nd, 1885; Mary, born December 1st, 1886; Ethel, born January 6th, 1888; Thomas Alfred, born February 22nd, 1889; and Letitia Tabitha, born March 12th, 1893.

[Sometimes there is a difficulty in getting the exact date of the children's births quickly when a petition is wanted in a hurry. In that case it would suffice to say, "John, aged 11 years, or thereabouts," and so on. If there are no children of the marriage, paragraph 2 of the petition should end thus: "and that your petitioner and his said wife have had no issue of their said marriage."]

Petition.
Forms of.
 Commence-
 ment of
 petition by
 wife.

[If the petitioner be the wife, the petition should commence as follows:]

In the High Court of Justice,
 Probate, Divorce and Admiralty Division.
 (Divorce.)

To the Rt. Honble. the President of the said Division.
 The day of 19 .

The petition of Charlotte Trowse, of The Loke Cottage,
 St. Mary-in-the-Marsh, in the county of Suffolk,
 sheweth:—

1. That your petitioner, then Charlotte Reedham
 [spinster or widow, *as the case may be*], was on the
 day of 19 , lawfully married to
 Timothy Trowse, smackowner, at present residing
 at 125, King Edward's Hill, Yarmouth, in the
 county of Norfolk (*see rule 220, ante, p. 288*),
 at .
 [Insert place of marriage as in last form.]

2. *[This paragraph will be as in the case of a petition
 by a husband, subject only to such alterations as
 are rendered necessary by the fact that the peti-
 tioner is the wife.]*

*[Every petition concludes with a prayer, setting out the
 relief sought, and must be signed by the petitioner. For
 conclusion of petition, see Forms 2 and 3.]*

FORM 2.

Simple Form of Petition by a Husband for a Dissolu- tion of Marriage on the ground of his Wife's Adultery.

By husband
 for dissolu-
 tion, alleging
 adultery and
 claiming
 custody of
 children.

[Commencement and paragraphs 1 and 2 as in Form 1.]

3. That on or about the 1st day of May, 19 , and on
 other days between that day and December 31st,
 19 , the said Charlotte Trowse, at 125, King

Edward's Hill aforesaid, committed adultery with Robert Marshland:

Petition.
Forms of.

4. That in and during the months of January, February, and March, 19 , the said Robert Marshland frequently visited the said Charlotte Trowse at 125, King Edward's Hill, aforesaid, and on divers of such occasions committed adultery with the said Charlotte Trowse.
5. That no previous proceedings with reference to the said marriage have either been commenced or prosecuted in the Divorce Division of the High Court of Justice, by or on behalf of either of the parties to the same (*or as the case may be*).
6. That at the time of the institution of this suit both the parties to the said marriage were domiciled in England (*or as the case may be*).

[*Something like the above two paragraphs must now be inserted in every petition under rules 219, 220, ante, pp. 287, 288.*]

Your petitioner therefore humbly prays—

That your Lordship will be pleased to decree that your petitioner's said marriage may be dissolved, together with such further and other relief in the premises as to your Lordship may seem meet (*a*).

(Signed) TIMOTHY TROWSE.

[An alternative form of prayer is given in the next form. In every petition the particulars of the charges against the respondent should be set out as clearly as possible; otherwise a summons for particulars is taken out, entailing further expense and trouble.

It is not competent to plead the ante-nuptial incontinence of the respondent, even though that and the adultery be charged with the same person. (*Fitzgerald v. Fitzgerald* (1862), 32 L. J. P. 12.)]

(*a*) It is not necessary for a father to ask for the custody of his children owing to his common law rights.

Petition.

Forms of.

FORM 3.

Form of Petition by a Wife for a Dissolution of her Marriage, containing Examples of various Charges on which such a Petition may be grounded.

By wife.
Charge of
cruelty.

[*Commencement and paragraphs 1 and 2 as in Form 1.*]

3. That in or about the month of 19 , at 125, King Edward's Hill, Yarmouth, in the county of Norfolk, the said Timothy Trowse with his clenched fist struck your petitioner in the eye:

Ibid.

4. That in or about the month of 19 , at , the said Timothy Trowse with his clenched fist with great violence struck your petitioner and knocked her down:

Ibid.
Threat to
murder.

5. That in or about the month of 19 , at , the said Timothy Trowse pointed a loaded pistol at your petitioner, and threatened to murder her:

Ibid.
Coarse, &c.
language.

6. That in and during the years 19 and 19 , at aforesaid, the said Timothy Trowse has habitually used coarse, violent, and threatening language towards your petitioner:

Paragraph
alleging
petitioner
compelled by
respondent's
conduct to
leave home.
Charge of
adultery.

7. That by reason of the premises, your petitioner, on or about the 11th day of October, 19 , left the said Timothy Trowse, and has never since returned to cohabitation with him:

Ibid.
Woman
unknown.

8. That on or about the day of 19 , at , in the county of , the said Timothy Trowse committed adultery with Edith Haddiscoe:

9. That on or about the day of 19 , the said Timothy Trowse, at 562, Dereham Road, Norwich, in the said county of Norfolk, committed adultery with a woman whose name is at present unknown to your petitioner:

Ibid.
Domestic
servant.

10. That in or about the months of October, November, and December, 19 , at 125, King Edward's Hill aforesaid, the said Timothy Trowse on divers occa-

sions committed adultery with Jane Brundell, a Petition.
 servant then in the employment of himself and Forms of.
 your petitioner:

11. That from about the month of October, 19 , to about the month of March, 19 , the said Timothy Trowse at 125, King Edward's Hill aforesaid, lived and cohabited and habitually committed adultery with a woman named Bella Buckenham: Charge of adultery. Habitual for months.
12. That on or about the 10th day of October, 19 , at 125, King Edward's Hill aforesaid, the said Timothy Trowse, without reasonable cause, threatened your petitioner that unless she forthwith left the house he would shut her up, and keep her without food. That in consequence, your petitioner was compelled to leave the said Timothy Trowse, and has ever since lived separate and apart from him; and that ever since about the 11th day of October, 19 , the said Timothy Trowse has, though frequently requested to do so, persistently refused to allow your petitioner to return to cohabitation with him: Petitioner driven from home by threats. Respondent persistently refusing to allow petitioner to return.
13. That on or about the day of 19 , the said Timothy Trowse, without cause, deserted your petitioner, and has never since returned to cohabitation with her; and that the said Timothy Trowse has deserted your petitioner without cause for the space of two years and upwards: Charge of desertion.
14. That on or about the 10th day of May, 19 , at the parish church of Plymouth, in the county of Devon, the said Timothy Trowse went through a ceremony of marriage with Caroline Cantley, then of Plymouth aforesaid, spinster (*or* widow), thereby committing the crime of bigamy: Charge of bigamy.
15. That afterwards the said Timothy Trowse, at Plymouth aforesaid, cohabited and habitually committed adultery with the said Caroline Cantley: Adultery after bigamous marriage.

Petition. (Or, "That afterwards, on divers occasions between the
Forms of. said 10th day of May, 19 , and the 4th day of
 19 , the said Timothy Trowse, at , in the county
 of , committed adultery with the said Caroline
 Cantley.")

Ibid. 16. That in or about the month of January, 19 ,
 at , in the county of , the said
 Timothy Trowse committed incestuous adultery
 with Rebecca Reedham, your petitioner's sister:

Charge of 17. That on the day of 19 , at , in
rape, &c. the county of , the said Timothy Trowse
 committed rape on the person of [or com-
 mitted sodomy or bestiality].

[Conclude with two paragraphs as in paragraphs 5 and 6
 of Form 2, to meet rules 219, 220.]

Your petitioner therefore humbly prays—

That your Lordship will be pleased to decree
 her:

1. A dissolution of her said marriage:
2. The custody of her said children:
3. Such further and other relief as meet.

(Signed) CHARLOTTE TROWSE.

[The Court will sometimes now give the petitioner the
 custody of the children under the prayer for further and
 other relief; but it is best for the wife to ask for it in the
 prayer in so many words. (See *Boddy v. Boddy and Grover*
 (1860), 30 L. J. P. 163; *Seymour v. Seymour* (1859), 1
 S. & T. 332.)

In a suit by the wife for dissolution of marriage on the
 ground of cruelty and adultery, if one of the charges only is
 established, the petitioner is entitled to a decree of judicial
 separation, and it is not necessary to ask for it in the alter-
 native in the prayer. (*Smith v. Smith* (1859), 1 S. & T.
 359; 28 L. J. P. 27; *Dent v. Dent* (1865), 4 S. & T. 105;
 34 L. J. P. 118; 13 L. T. 252; *Bromfield v. Bromfield*
 (1871), 41 L. J. P. 17; 26 L. T. 264; *Grossi v. Grossi* (1873),
 L. R., 3 P. & D. 118; 42 L. J. P. 69; 28 L. T. 371; *Mycock*

v. *Mycock* (1870), L. R., 2 P. & D. 98; 39 L. J. P. 56; 23 L. T. 238.)

Where a petitioner was in permanent employment abroad, the Court allowed the petition to be signed by his solicitor. (*Hobson, Ex parte* (1894), 70 L. T. 816; 6 R. 601.)]

Petition.
Forms of.

FORM 4.

**Specimen of a Paragraph in a Petition by a Wife
alleging Cruelty in general terms.**

3. That frequently during the said marriage the said Timothy Trowse has treated your petitioner with great unkindness and cruelty; that he frequently, in gross and filthy language, abused your petitioner, and swore at and beat and struck her, and gave her black eyes, and in divers other ways violently assaulted her; that he has frequently kept her without sufficient food, and turned her out into the street, and in divers other ways been guilty of cruelty—in the legal sense of the term—towards her, by reason whereof your petitioner's health became and was seriously affected, and she has suffered, and still suffers, great pain, both mentally and physically.

Petition by
wife.
Paragraph
alleging
cruelty in
general terms.

[*A paragraph such as the above is sometimes of great value where it is important to serve a petition without a moment's unnecessary delay. It is wide enough in its terms to cover every charge, and the details can afterwards be obtained by the respondent, on a summons for particulars; as to which see post, pp. 361—366.*]

FORM 5.

**Petition by a Husband for Dissolution of Marriage by
reason of the Wife's Adultery, and for Damages
from the Co-respondent.**

[*Commencement and Paragraphs 1 and 2 of petition as in Form 1.*]

[*Paragraphs 3 and 4 allege adultery, as in Form 2.*]

Ibid., by hus-
band,
claiming
damages.

Petition.
Forms of.

5. That from about the month of 19 , to about the month of 19 , at , in the county of , the said Robert Marshland and Charlotte Trowse lived and cohabited together as husband and wife, and that at such residence aforesaid the said Robert Marshland and Charlotte Trowse habitually committed adultery together:
6. That your petitioner claims from the said Robert Marshland as damages in respect of his said adultery so committed the sum of 5,000*l*.

[*Conclude with two paragraphs as in Form 2, paragraphs 5 and 6, to meet rules 219, 220, ante, pp. 287, 288.*]

Your petitioner therefore humbly prays—

That your Lordship will be pleased to decree that his said marriage may be dissolved, and that your Lordship will be pleased to ascertain by the verdict of a jury the amount of damages to be paid by the co-respondent, and to direct how such damages may be applied, and that the petitioner may have such other and further relief as may be meet.

[*Or the following may be used as an alternative form of prayer.*]

The petitioner therefore humbly prays—

That your Lordship will be pleased to ascertain by the verdict of a jury the amount of damages to be paid by the co-respondent, and to direct how such damages may be applied; and to decree:

1. A dissolution of his said marriage:
2. Such further and other relief as may be meet.

[*Signature of petitioner.*]

[Every petition for dissolution should set out carefully and accurately the facts relied upon (*Keats v. Keats and*

<p><i>Montezuma</i> (1859), 1 S. & T. 334; 28 L. J. P. 176); but not the evidence by which it is proposed to support them. (<i>Pyne v. Pyne</i> (1858), 1 S. & T. 80.) Adultery must be alleged in distinct terms (<i>Ambler v. Ambler and Hoghton</i> (1861), 32 L. J. P. 6; 7 L. T. 299; <i>Spilsbury v. Spilsbury</i> (1863), 3 S. & T. 210; 32 L. J. P. 126; 9 L. T. 23), and “<i>desertion</i>” in such terms as to show that it amounts to legal desertion. (<i>Pyne v. Pyne, supra.</i>) If “<i>bigamy</i>” is alleged, adultery subsequent to the bigamous marriage must be alleged also. (<i>Bonaparte v. Bonaparte</i> (1891), 65 L. T. 795.) The particular acts of cruelty relied on must be set forth in the petition, if it is desired to avoid a summons for particulars. (<i>Suggate v. Suggate</i> (1859), 1 S. & T. 489; 28 L. J. P. 46; <i>Goldney v. Goldney</i> (1862), 32 L. J. P. 13.) If it is desired to charge the respondent with infecting the petitioner with a venereal disease, such charge must be specifically alleged in the petition. (<i>Squires v. Squires</i> (1864), 3 S. & T. 541; 33 L. J. P. 172; <i>Jewell v. Jewell</i> (1862), 2 S. & T. 573; 6 L. T. 369.) Where damages are claimed the petition must specify the amount. (<i>Spedding v. Spedding and Smith</i> (1862), 31 L. J. P. 96.)]</p>	<p><u>Petition.</u> Forms of.</p>
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Petitions should be endorsed in the following form:—

FORM 6.

Endorsement of Petition.

<p>In the High Court of Justice, Probate, Divorce and Admiralty Division. (Divorce.) In the matter of the petition of Timothy (<i>or</i> Charlotte) Trowse for dissolution of marriage. Petition for dissolution. Brown & Jones, 225, Coleman Street, E.C., Petitioner's Solicitors.</p>	<p>Endorsement of petition.</p>
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**AFFIDAVIT
IN SUPPORT.**

Affidavit in
support of
petition.

AFFIDAVIT IN SUPPORT AND CITATIONS.

By rule 2, "Every petition shall be accompanied by an affidavit made by the petitioner, verifying the facts of which he or she has personal cognizance, and deposing as to belief in the truth of the other facts alleged in the petition, and such affidavits shall be filed with the petition."

[Sometimes, under very special circumstances, as where the petitioner is necessarily absent abroad, see *Ex parte Bruce* (1881), 6 P. D. 16; 50 L. J. P. 96; *Ex parte Tartt* (1886), 34 W. R. 368; *Ex parte Hobson* (1894), 70 L. T. 816; 6 R. 601; or where the petitioner was British consul and the only authority before whom the affidavit could be sworn, *Russell v. Russell and Maclaren* (1889), 59 L. J. P. 13; 62 L. T. 186, the Court, on an application being made for that purpose, has allowed the petition to be verified by the affidavit of the petitioner's solicitor.]

Contents of.

And by rule 3, "In cases where the petitioner is seeking a decree of dissolution of marriage, the petitioner's affidavit, filed with his or her petition, shall further state that no collusion or connivance exists between the petitioner and the other party to the marriage or alleged marriage."

FORM 7.**Affidavit Verifying Petition.**

Form of.

In the High Court of Justice,
Probate, Divorce and Admiralty Division.
(Divorce.)

TROWSE (Timothy) v. TROWSE (Charlotte) and
MARSHLAND (Robert).

or, Between Timothy TROWSE, petitioner,
Charlotte TROWSE, respondent, and
Robert MARSHLAND, co-respondent.

[If the petitioner be the wife, the heading should be as follows:]

TROWSE (Charlotte) v. TROWSE (Timothy).

or, Between Charlotte Trowse, petitioner, and
Timothy Trowse, respondent.

**Affidavit in
Support.**

[This heading or title occurs in the affidavit for the first time. It does not occur in the petition, because, until the petition is filed, there is no cause of "Trowse v. Trowse and Marshland" or "Trowse v. Trowse" in existence.]

In the matter of the Petition of Timothy Trowse (or Charlotte Trowse) for dissolution of marriage.

I, TIMOTHY TROWSE (or, CHARLOTTE TROWSE, of The Loke Cottage, St. Mary-in-the-Marsh, in the county of Suffolk), of 125, King Edward's Hill, Yarmouth, in the county of Norfolk, Smackowner, the Petitioner in this cause, make oath and say as follows:—

1. That the statements contained in paragraphs 1, 2, Form of. and 3 of my petition filed in the above cause are true: *[or if the petitioner has personal knowledge of every allegation in the petition, that the statements contained in my petition filed in the above cause are true]*:
2. That the statements contained in paragraphs 4 and 5 are true to the best of my knowledge, information, and belief:
3. That there is not any collusion or connivance between me and my said wife *[or the said Charlotte Trowse]* in any way whatever.

Copy out your petition or Affidavit on foolscap paper, folded in half lengthwise, following one or other of the above forms. The petition should be endorsed.

FORM 8.

Endorsement of Affidavit Verifying Petition.

In the High Court of Justice,
Probate, Divorce and Admiralty Division.
(Divorce.)

Endorsement
of.

TROWSE (Timothy) v. TROWSE (Charlotte) and
MARSHLAND (Robert),
or, TROWSE (Charlotte) v. TROWSE (Timothy).

Affidavit in
Support.

Affidavit in support of petition for dissolution of
marriage.

Brown & Jones,
225, Coleman Street, E.C.,
Petitioner's Solicitors.

In all cases the name and address of the petitioner's solicitor must be written at the bottom of the endorsement, or if the petitioner appears in person, the words "in person" with an address for service, within three miles of the General Post Office.

Contents of.

It should always be remembered, in drafting a petition, that if the names of the parties, and the date and place of marriage are not correctly given, the petition will have to be amended and (unless the Court should for special reasons order otherwise) re-served, entailing unnecessary trouble and expense.

Names of
parties and
date of
marriage
must be
correct.

Before commencing proceedings, therefore, solicitors should always procure a copy of the marriage certificate, which they can do at Somerset House. They *must* do so later, as a copy of the certificate must be left with the papers when the cause is set down for trial. It is, therefore, better to obtain it in the first instance, as they will then have the names of the parties and the date and place of marriage before them in black and white, and there should be no possibility of a mistake.

Filed
within six
months of
marriage.

The marriage certificate also gives the ages of the parties, but as this document does not appear on the proceedings before the cause is set down for trial, it is necessary for the petitioner's solicitors, or some other competent person, to give a certificate that the petitioner is of full age, *wherever the proceedings are commenced within six months of the date of the marriage.*

No special form of certificate is necessary, but, like every other document, it must be headed in the cause, and signed, of course, by the party making it.

Where the petitioner is a minor, the proceedings are

commenced by a guardian *ad litem*, as to the election of whom, see *post*, pp. 319—328.

Petition.

Contents of.

By rule 8, "Every petitioner who files a petition and affidavit shall forthwith extract a citation under the seal of the Court for service on each respondent in the cause." The petition and affidavit must be filed before the citation can be extracted.

CITATIONS.

Rules as to.

And by rule 9, "Every citation shall be written or printed on parchment, and the party extracting the same, or his or her proctor, solicitor, or attorney, shall take it, together with a *præcipe*, to the registry, and there deposit the *præcipe* and get the citation signed and sealed. The address given in the *præcipe* must be within three miles of the General Post Office."

Form of.

Address within three miles of General Post Office.

This address is ordered to be given for the purpose of facilitating business, and it will be sufficient for the opposing party to leave there all pleadings and other documents which are not expressly required by the rules to be personally served.

The following is adapted from the official form of citation:—

FORM 9.

Citation.

In the High Court of Justice, Cause No. .
Probate, Divorce and Admiralty Division.
(Divorce.)

Citation, form of.

GEORGE V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the seas, King, Defender of the Faith.

To [*see the next two forms*].

WHEREAS Timothy Trowse, of 125, King Edward's

Citations.

Hill, Yarmouth, in the county of Norfolk, claiming to have been lawfully married to you, has filed his petition against you in the Divorce Registry of our said Court, praying for a dissolution of marriage, wherein he alleges that you have been guilty of [*see the next two forms*]: Now THIS IS TO COMMAND YOU, that within eight days after service hereof on you, inclusive of the day of such service, you do appear in our said Court then and there to make answer to the said petition, a copy whereof, sealed with the seal of our said Court, is herewith served upon you. AND TAKE NOTICE, that in default of your so doing, our said Court will proceed to hear the said charge [*or charges*] proved in due course of law, and to pronounce sentence therein, your absence notwithstanding. And take further notice, that for the purpose aforesaid you are to attend in person, or by your solicitor, at the Divorce Registry of our said Court at Somerset House, Strand, in the county of Middlesex, and there to enter an appearance in a book provided for that purpose, without which you will not be allowed to address the Court, either in person or by counsel, at any stage of the proceedings in the cause.

Dated at London the day of 19 , and in
the year of our reign.

L.S.

(Signed) X. Y., Registrar.

[*A citation has also to be issued against the co-respondent. It is in the same form, substituting the name "Robert Marshland" for Charlotte Trowse and the entries as in Form 11.*]

Citations extracted in suits for dissolution should contain the following entries:—

Citations.

(1.) If against the respondent—

FORM 10.

To Charlotte Trowse, of the Loke Cottage, St. Mary-in-the-Marsh, in the county of Suffolk.

WHEREAS Timothy Trowse, of 125, King Edward's Hill, Yarmouth, in the county of Norfolk, claiming to have been lawfully married to you, has filed his petition against you in the Divorce Registry of our said Court, praying for a dissolution of marriage, wherein he alleges that you have been guilty of—

Entries in
citation
against
respondent.

1. Adultery,
2. Bigamy with adultery, or
3. Incestuous adultery.

NOW THIS IS TO COMMAND, &c. [*as in Form 9*].

(2.) If against a co-respondent—

FORM 11.

To Robert Marshland, of St. Mary-in-the-Marsh, in the county of Suffolk.

WHEREAS Timothy Trowse, of 125, King Edward's Hill, Yarmouth, in the county of Norfolk, claiming to have been lawfully married to Charlotte Trowse, has filed his petition against her in the Divorce Registry of our said Court, wherein he alleges that you have been guilty of adultery with the said Charlotte Trowse. NOW THIS IS TO COMMAND, &c. [*as in Form 9*].

Citations. In a suit for dissolution by a wife against a husband
Suit by wife the citation and entries would be as follows:—
against
husband.

FORM 12.

Citation, In the High Court of Justice, Cause No. .
form of. Probate, Divorce and Admiralty Division.

(Divorce.)

GEORGE V., by the grace of God of the United Kingdom
 of Great Britain and Ireland and of the British
 Dominions beyond the seas, King, Defender of the
 Faith.

To Timothy Trowse, of 125, King Edward's Hill,
 Yarmouth, in the county of Norfolk.

WHEREAS Charlotte Trowse, of The Loke Cottage,
 St. Mary-in-the-Marsh, in the county of Suffolk, afore-
 said, claiming to have been lawfully married to you, has
 filed her petition against you in the Divorce Registry
 of the said Court, praying for a dissolution of marriage,
 wherein she alleges that you have been guilty of—

1. Adultery and cruelty, *or*
2. Adultery and desertion, *or*
3. Adultery, cruelty and desertion, *or*
4. Bigamy and adultery, *or*
5. Incestuous adultery, *or*
6. Rape, *or*
7. Sodomy, *or*
8. Bestiality.

NOW THIS IS TO COMMAND, &c. [*as in Form 9*].

[*Such words as "cruelty," "desertion," occurring in a citation, can only be used in their strict legal sense, and no other, and it is evident that the offence charged can only have been committed against the petitioner. Besides, the nature of the offence and the facts relating to it are set out in the petition. It is therefore mere unnecessary verbiage*

to insert in a citation such words as "cruelty towards her and desertion of her for two years and upwards without reasonable excuse," or "that you have failed to comply with a decree made by the Court in a suit for restitution of conjugal rights," &c. In the former case the word "cruelty" covers everything; in the latter, the word "desertion."]

Citations.

The following form of præcipe for citation is one of the forms officially issued from the registry:—

FORM 13.

In the High Court of Justice,
Probate, Divorce and Admiralty Division.
(Divorce.)

Præcipe for.

Citation for Timothy Trowse, of 125, King Edward's Hill, Yarmouth, in the county of Norfolk, against Charlotte Trowse, of The Loke Cottage, St. Mary-in-the Marsh, in the county of Suffolk [*or Robert Marshland, of St. Mary-in-the-Marsh, in the county of Suffolk, as the case may be*], to appear in a suit for _____ by reason of _____

(Signed) BROWN & JONES,
Solicitors for the said Timothy Trowse.

[*Here insert the address required within three miles of the General Post Office.*]

[*A præcipe for citation by the wife against the husband is, mutatis mutandis, in exactly the same form.*]

Procure a citation (a form of which on parchment may be had at most law stationers'). Fill up the blanks according to your case, and write your name and address at the bottom left-hand corner, and take it, together with the petition, the affidavit, a præcipe, drawn on a sheet of foolscap folded lengthwise, to the Divorce Registry. The proper officer will file the petition and affidavit. Leave with him the præcipe and the citation; he will affix his

Directions as to extracting citation, filing petition, &c.

Citations.

initials to the citation, and will forward it to the registrar for his signature; the citation will then be sent to the seal seat in the Probate Office, whence you must obtain it, with the seal of the Court attached. The addresses of the parties to be cited must appear in the citation.

[Where these addresses are unknown, the parties should be described as of their last known address, omitting the usual words "*late of.*" (*Forster v. Forster* (1863), 32 L. J. P. 134.) If the names of parties cited are misspelt, and *there is no appearance*, the Court will require fresh citations to be extracted and reserved (*Cotton v. Cotton and Kinnis* (1862), 4 S. & T. 275; 32 L. J. P. 133); but it would be otherwise if the party appeared and condoned the mistake. (See *Churchill v. Churchill and Abbott* (1868), L. R., 1 P. & D. 48; 37 L. J. P. 41; 17 L. T. 610.)]

Directions for service of.

By rule 10, "Citations are to be served personally when that can be done."

Personal, if possible.

By rule 11, "Service of a citation shall be effected by personally delivering a true copy of the citation to the party cited, and producing the original, if required."

[Personal service is insisted on wherever possible. In a matrimonial cause a solicitor cannot, as in an ordinary civil action, agree to accept service for his client. (See *Milne v. Milne* (1865), 4 S. & T. 183; 34 L. J. P. 143; *De Niceville v. De Niceville* (1868), 37 L. J. P. 43.)]

Papers to be delivered to party served.

And by rule 12, "To every person served with a citation shall be delivered, together with the copy of the citation, a certified copy of the petition, under seal of the Court."

[*Sometimes the petitioner's solicitor makes the copy of the petition, which, on the official being satisfied that it is a true copy, may be sealed in the registry; this is done for expedition, but the same fees are charged.*]

Return of citation.

By rule 14, "After service has been effected, the cita-

tion, with a certificate of service endorsed thereon, shall be forthwith returned into and filed in the registry.” Citations.

[This return is necessary to preserve evidence that the proper steps have been taken. The Court will not make an order dispensing with such return without proof of service both on the respondent and co-respondent. (See *Perret v. Perret and Alt* (1877), 35 L. T. 910; *Chilcott v. Chilcott and Smith* (1873), 43 L. J. P. 8; 29 L. T. 548; *Cridland v. Cridland* (1889), 60 L. T. 398.)]

FORM 14.

Certificate of Service of Citation.

This citation was duly served by the undersigned Albert Fox on the within-named Charlotte Trowse, at Frogthorpe, in the county of Norfolk [*or* Robert Marshland, at St. Mary-in-the-Marsh, in the county of Suffolk, *as the case may be*], on the 24th day of May, 19 .

(Signed) ALBERT FOX.

Certificate of service.

[The Court will not hear the case until the citation is returned and filed. (*Cooke v. Cooke and Quaile* (1858), 2 S. & T. 50; 28 L. J. P. 37.)]

By rule 18, an affidavit of service of citation must be substantially in the following form, and the citation referred to in the affidavit must be annexed to such affidavit, and marked by the person before whom the same is sworn.

FORM 15.

Affidavit of Service of Citation.

In the High Court of Justice,
Probate, Divorce and Admiralty Division.
(Divorce.)

Affidavit of service.

Trowse (Timothy) *v.* Trowse (Charlotte) and
MARSHLAND (Robert).

I, Albert Fox, managing clerk to Messrs. Brown &
20 (2)

Citations. Jones, of 225, Coleman Street, E.C., solicitors to the petitioner, make oath and say:—

Affidavit of service.

That the Citation, bearing date the day of May, 19 , issued under Seal of the said Division of this Court against Charlotte Trowse, the respondent [*or* Robert Marshland, the co-respondent] in this cause, and now hereunto annexed, marked with the letter A., was duly served by me on the said Charlotte Trowse [*or* Robert Marshland], at Frogthorpe, in the county of Norfolk [*or* St. Mary-in-the-Marsh, in the county of Suffolk], by showing to her [*or* him] the Original Citation under Seal, and by leaving with her [*or* him] a true copy thereof, on the day of May, 19 . And I further make Oath and say that I did at the same time and place deliver to the said Charlotte Trowse [*or* Robert Marshland] personally a certified copy, under Seal of the said Division of this Court, of the Petition filed in this Cause.

Sworn at, &c. on the
day of , 19 .
Before me

}

Substituted service.

By Rule 13, "In cases where personal service cannot be effected, application may be made by motion to the Judge Ordinary, or to the registrars in his absence, to substitute some other mode of service."

Application for, must be by motion.

It follows from the above rule that applications for substituted service must be made on motion in open Court and not by summons in Chambers.

To registrars.

Applications on motion are made to the registrars in place of the judge during the vacations, and are heard by the registrars sitting at Somerset House (see "Practice as to Motions and Summonses," *post*, p. 511).

Such applications are *ex parte*.

Applications for substituted service are *ex parte* applications, and notice of them need not be served on any of the parties who have already appeared.

Substituted service.

Applications for substituted service must be supported

by affidavits, one of which must be made by the petitioner.

Citations.

[The petitioner's affidavit must be properly corroborated. (*Williams v. Williams and Pocock*, (1896) P. 153; 65 L. J. P. 98.)]

Every practical effort to effect personal service should be made before applying for substituted service, and all such efforts should be set out fully and clearly in the affidavits filed in support, for the information of the Court. The affidavits should also, if possible, give the addresses of one or more relatives or friends of the parties it is desired to serve who are likely to be acquainted with their whereabouts.

Contents of affidavits.

[See the following cases on the subject of substituted service: —*Robotham v. Robotham* (1858), 1 S. & T. 73; 27 L. J. P. 33; *Chandler v. Chandler* (1858), 27 L. J. P. 35; *Sudlow v. Sudlow* (1858), 28 L. J. P. 4; *Lacey v. Lacey*, *ibid.* 24; *Chandler v. Chandler*, *ibid.* 6; *Cooke v. Cooke*, *ibid.* 5; *Bland v. Bland* (1875), L. R., 3 P. & D. 233; 44 L. J. P. 14; 32 L. T. 404; *Appleyard v. Appleyard and Smith* (1875), L. R., 3 P. & D. 257; *Jenson v. Jenson* (1898), 78 L. T. 764; *Martin v. Martin*, *ibid.* 170; *Nicolas v. Nicolas* (1899), 68 L. J. P. 66; 80 L. T. 422; *Trübner v. Trübner and Cristiani* (1889), 15 P. D. 24; 59 L. J. P. 56; 62 L. T. 186; *Stumpel v. Stumpel and Zepfel* (1901), 70 L. J. P. 6.]

Where there are several parties cited, some of whose addresses are known and some not, the fact that it is necessary to apply for substituted service on those persons whose addresses are unknown need not delay the issuing of the citation against such of the parties whose addresses are known, and who can be served personally.

Service on some of the parties only.

The application, which must be made on motion, and cannot be made by summons, may be made as soon as the petition is filed, or at any time before setting down the cause for trial.

Time of applying for.

[As to the formal steps to be taken in the Registry for bringing a motion to a hearing, see "Practice as to Motions and Summonses," post, p. 511.]

Citations.

Form of order
for substituted
service.

FORM 16.

Order for Substituted Service of Citation.

Before the Rt. Honble. Sir Samuel Evans, Knight, the
President, sitting at the Royal Courts of Justice,
Strand, in the county of Middlesex.

The day of May, 19 .

TROWSE *v.* TROWSE and MARSHLAND.

On reading the statement filed on behalf of the petitioner and affidavit of the petitioner and Robert Charles Trass, the solicitor to the petitioner, sworn the day of May, 19 , and hearing counsel thereon, it is ordered that personal service on the respondent [*or co-respondent*] of the citation issued against her [*or him*] in this cause be dispensed with, and that the said citation, together with a sealed copy of the petition filed in this cause, be personally served on Rebecca Reedham, of Frogthorpe, in the county of Norfolk, a sister of the said respondent [*or Martin Marshland, of St. Mary-in-the-Marsh, in the county of Suffolk, brother of the said co-respondent*], and that the said citation, or an abstract thereof, to be settled by one of the registrars of this Division of his Majesty's High Court of Justice, be advertised three times [*or as the case may be*], at an interval of a week, in such newspapers as the said registrar may direct.

By advertise-
ment.

When substituted service is ordered, it is usually ordered to be effected by advertisement in some newspaper or newspapers to be fixed upon by the registrar, and by leaving the sealed copy of the citation with some relative or friend of the party to be served.

[Sometimes, under special circumstances, the Court orders service by registered letter. (See *Trübner v. Trübner and Cristiani* (1889), 15 P. D. 24; 59 L. J. P. 56; 62 L. T. 186; *Cox v. Cox* (1889), 61 L. T. 698; *Stumpel v. Stumpel and Zepfel* (1901), 70 L. J. P. 6.) But this form of substituted service is much less frequently allowed, and when it is, advertisements are generally ordered as well.]

When substituted service is ordered by advertisement the next step is to file an abstract of citation for the purpose of such advertisement, which abstract must, as stated in the order, be finally settled by the registrar.

Citations.

Abstract of citation.

FORM 17.

Example of an Abstract of Citation for Advertisement.

To Charlotte Trowse, late of The Loke Cottage, St. Mary-in-the-Marsh, in the county of Suffolk
[or Robert Marshland, late of St. Mary-in-the-Marsh, in the county of Suffolk].

Abstract of citation.

Take notice that a citation, bearing date the day Form of.
of May, 19 , has issued out of the Divorce Registry of our said Court, citing you to appear and answer the petition of Timothy Trowse, of 125, King Edward's Hill, Yarmouth, in the county of Norfolk, praying for a dissolution of his marriage with you, on the ground of your having committed adultery with Robert Marshland [or with his wife, Charlotte Trowse, on the ground of her having committed adultery with you]. In default of your appearing, the Court will proceed to hear and determine the said charge, and you will not be allowed to address the Court. Therefore take notice that for the purpose aforesaid you are within days from the date of this advertisement to attend in person, or by your solicitors, at the Divorce Registry of our said Court, and there to enter an appearance in a book provided for that purpose.

Brown & Jones,
225, Coleman Street, E.C.,
Petitioner's Solicitors.

(Signed) X. Y., Registrar.

To be inserted three times in each of the following newspapers:—The *Times* (London), *Lloyd's Weekly Newspaper*, *East Anglian Times*.

Citations.

The solicitor leaves a draft abstract of citation in the Divorce Registry in order that it may be settled by the registrar. There is a fee of 10s. to be paid. If the order for service by advertisement is on more parties than one, they can be all included in one advertisement.

Time for settling.

It takes two or three days to settle the abstract of citation, which should not be called for before the third or fourth day.

Abstract to be ultimately filed.

It must not be forgotten that this abstract of citation has ultimately to be filed in the registry, together with the advertisements (as to which, see *post*, r. 15).

Therefore copies only should be left (though there is no objection to showing the original) at the newspaper offices.

Filing advertisements.

By rule 15, "When it is ordered that a citation shall be advertised, the newspapers containing the advertisements are to be filed in the registry with the citation."

This is done after the time for appearance has expired.

If there has been no appearance, the abstract with the advertisements, the citations and affidavits of service of citation, and non-appearance, must be filed.

Affidavit of service.

The affidavits of the substituted service and non-appearance should specify an accurate compliance with the order directing such substituted service, the insertions of the abstract (which is settled by the registrar) of the citation in the particular newspapers ordered, with the dates.

Filing newspapers.

It is only necessary to file so much of the newspaper as is sufficient to prove its identity and date as set forth in the affidavit of service, and contains the advertisement, which should be clearly marked in some way, to facilitate immediate reference.

FORM 18.

Affidavit of Advertisement of Abstract of Citation.

In the High Court of Justice,
Probate, Divorce and Admiralty Division.

Affidavit of
advertise-
ment.

(Divorce.)

TROWSE (Timothy) *v.* TROWSE (Charlotte) and
MARSHLAND (Robert).

I, Albert Fox, managing clerk to Messrs. Brown and Jones, of 225, Coleman Street, E.C., solicitors for the petitioner in the above cause, make oath and say as follows:—

I caused to be duly inserted in the *Times* (London) daily newspaper of the 7th, 14th, and 21st days of May, 19 , and in the *East Anglian Times* daily newspaper of the same dates, and in *Lloyd's Weekly Newspaper*, of the 8th, 15th, and 22nd days of May, 19 , an abstract of citation of Charlotte Trowse, the respondent [*or* Robert Marshland, the co-respondent], in the above-mentioned suit, and printed copies of the said newspapers are hereunto annexed, and marked respectively A., B., and C.

Sworn, &c.

An affidavit of service is required in all cases where personal service on third persons forms part of the order, as in Form 16.

Affidavit of
service.

If the order only directs service by advertisement and nothing else, it would appear such affidavit of service is unnecessary.

Citations.

FORM 19.

Affidavit of Service of Citation after Order for
Substituted Service.

Affidavit of
substituted
service.

[*Commencement as in Form 15.*]

TROWSE *v.* TROWSE and MARSHLAND.

I, Albert Fox, managing clerk to Messrs. Brown and Jones, of 225, Coleman Street, E.C., solicitors for the petitioner in the above cause, make oath and say as follows:—

That the citation bearing date the day of May, 19 , issued under seal of the said Division of this Court against Charlotte Trowse, the respondent in this cause, and now hereunto annexed, marked with the letter X, was duly served by me on Rebecca Reedham, at Frogthorpe, in the county of Norfolk, by showing to her the original citation under seal, and by leaving with her a true copy thereof on the day of May, 19 , pursuant to the order for substituted service made herein, dated the day of May, 19 . (And I further make oath and say that I did, at the same time and place, deliver to the said Rebecca Reedham personally a certified copy, under seal of the said Division of this Court, of the petition filed in this cause.)

Substituted
service of,
by advertise-
ment.

Sworn, &c.

ALBERT FOX.

Where an appearance has been entered after an order for substituted service by advertisement, the citation only need be filed; and should such appearance be entered before such order has been acted upon, or before it has been wholly or partially carried out, there is no occasion to proceed further with it.

By rule 16, "The above rules, so far as they relate to

the service of citations, are to apply to the service of all other instruments requiring personal service."

Citations.

And the above directions as to substituted service apply equally to all cases where personal service is required.

Service of a citation on a minor is sufficient service. Petitions and citations in suits for dissolution may be served anywhere "in or out of his Majesty's dominions"; in other words, in or out of the jurisdiction of the Court.

Service on minor.

Service out of the jurisdiction of the Court.

FEES.

	£	s.	d.
Filing each document	0	2	6
Office copy petition	0	2	6
Examining	0	2	6
Sealing	0	5	0
Præcipe for citation	0	5	0
Sealing each citation	0	5	0

FEES.

[If the office copy of the petition contains more than 5 folios, 6d. a folio will be charged over and above such 5 folios.]

If it contains more than 10 folios, 3d. a folio will be charged over and above such 10 folios, for the examination.

Fees are paid by stamps for the amounts due, which by an order of March, 1896, must be affixed to the document to which they relate and cancelled by one of the clerks belonging to the Divorce Registry, in the presence of the person handing it in.

Stamps can be bought in the Divorce Registry, Room No. 43.]

Where there is an application for substituted service of the citation the following fees are charged:—

Substituted service.

On filing case on motion (including the order)	£	s.	d.
	0	10	0

[For the practice as to case on motion, see tit. "Practice as to Motions and Summons," *post*, p. 511.]

Fees.		£	s.	d.
	On leaving abstract to be settled . . .	0	10	0
	On filing abstract and advertisements . . .	0	2	6
	„ affidavit and citation . . .	0	5	0

[See also post, pp. 540—603.]

Costs allowed
on taxation.

It is impossible to lay down any hard-and-fast rule as to what costs will be allowed on taxation, as the amounts vary considerably in different cases, and the practice of registrars in taxing is not always identical.

The following is an extract from a taxed bill of costs, and shows the amounts allowed by the registrar up to the conclusion of proceedings for substituted service. It will be observed that the proceedings extended over more than one sitting:—

Amounts allowed on taxation.		£	s.	d.
	Drawing and fair copy statement of petitioner by way of instructions for petition . . .	0	6	8
	Drawing and engrossing retainer to counsel, and attending him . . .	0	6	8
	Fee to him and clerk . . .	1	3	6
	Drawing and engrossing petition . . .	1	0	0
	Paid fee to counsel to settle petition, and clerk . . .	1	3	6
	Attending him . . .	0	3	4
	Instructions for affidavit in support of petition, drawing and engrossing same . . .	0	13	4
	Attending petitioner when she signed petition, and with her to be sworn to affidavit . . .	0	6	8
	Paid oath . . .	0	1	6
	Having obtained certificate of marriage in German from British consul at . . . , attending translator, and getting same translated into English and copied . . .	0	6	8
	Paid translator . . .	0	7	3
	Fee to consul . . .	0	11	0

	£	s.	d.	Fees.
Attending at the registry, filing petition and affidavit	0	6	8	
Paid filing	0	5	0	
Attending at the registry to get citation signed and sealed	0	6	8	
Paid stamp thereon	0	5	0	
Copy for service	0	1	8	
Attending at the registry bespeaking office copy, petition for service	0	6	8	
Paid for same	0	2	6	

[An item of 6s. 8d. for attending to get same sealed and certified was disallowed.]

Paid fees for sealing and certifying	0	7	6	
Instructions for affidavit of petitioner in support of application for substituted service	0	6	8	
Drawing same, eight folios	0	8	0	
Engrossing same	0	2	8	
Attending petitioner, reading over same, and with her to a commissioner to be sworn	0	6	8	
Paid oath	0	1	6	
Writing to friend of respondent to ascertain if he could give us his present address	0	3	6	
Term fee	0	15	0	

THE FOLLOWING SITTINGS.

Drawing affidavits in support of motion for substituted service, seventeen folios	0	17	0	
Engrossing same	0	5	8	
Marking exhibit thereto	0	1	0	
Attending commissioner on being sworn to affidavit	0	6	8	

Fees.	£ s. d.
Paid oath and exhibit	0 4 0
Drawing case on motion for substituted service and fair copy, eleven folios	0 10 0
Attending filing case and affidavits	0 6 8
Paid filing case	0 10 0
Paid filing affidavits	0 5 0
Instructions to counsel to move	0 6 8
Copy case and affidavits for counsel, eleven and twenty-five folios respectively	0 12 0
Paid fee to counsel and clerk to move	2 4 6
Attending Court when order made for sub- stituted service, serving copy citation on respondent's solicitor, and posting a copy to respondent's club, and by adver- tisement, nearly all day	0 13 4
Attending in the registry bespeaking office copy order	0 6 8
Paid for same	0 2 6
Attending for and obtaining same	0 6 8
Copy for service, three folios	0 1 0
Certificate of service	0 2 6
Drawing abstract of citation for advertise- ment	0 5 0
Copy for registrar to settle, two folios	0 0 8
Attending in the registry settling same	0 6 8
Paid fee	0 10 0
Attending bespeaking further office copy petition, and afterwards for same	0 6 8
Paid for same	0 12 0
Engrossing advertisement, two folios	0 0 8
Attendance obtaining registrar's signature	0 6 8
Copy for insertion in <i>Times</i> and <i>Daily</i> <i>Mail</i> , two folios each	0 1 4
Attending to insert advertisement in the <i>Times</i>	0 6 8

	£	s.	d.	Fees.
Ditto <i>Daily Mail</i>	0	6	8	
Attending filing advertisements and abstract	0	6	8	

[A further charge of 5s. each was allowed for personal service of the petition on the respondent's solicitor, and for sending the same documents by post to the respondent and registering them, as directed in the order for substituted service.]

The above extract is extremely valuable, as showing what was allowed in a case that was actually tried in the Divorce Court.

The precedents as to taxed costs and lists of fees contained in "Johnson's Bills of Costs," 2nd ed. 1901, and "The Handy Book to Solicitor's Costs," by A. C. Dayes, both published by Sweet and Maxwell, Limited, 3, Chancery Lane, and Stevens and Sons, Limited, 119, 120, Chancery Lane, will be found extremely useful and reliable.

GUARDIANSHIP.

Where a petitioner is a minor, a lunatic, or an invalid, to such an extent as to be unable to prosecute a suit for himself or herself, the Court will assign a guardian *ad litem* for the purpose of conducting the proceedings.

GUARDIANSHIP.

Minors, lunatics, and invalids.

Appointment of guardian *ad litem*.

The appointment of guardians to minors is regulated by the following rules:—

By rule 105, "A minor above the age of seven years may elect any one or more of his or her next of kin, or next friends, as guardian, for the purpose of proceeding on his or her behalf as petitioner, respondent, or intervener in a cause."

Minor.

Guardianship. By rule 106, "The necessary instrument of election must be filed in the registry, before the guardian elected can be permitted to extract a citation or enter an appearance on behalf of a minor."

By rule 107, "When a minor shall elect some person or persons other than his or her next of kin, as guardian for the purposes of a suit, or when an infant (under the age of seven years) becomes a party to a suit, application, founded on affidavit, is to be made to one of the registrars, who will assign a guardian to the minor or infant for such suit."

[So much of the above rule as relates to infants under seven years cannot apply to petitioners.]

Affidavit in support of application.

The affidavit in support of an application to assign a guardian other than the next of kin must satisfy the registrar that the proposed guardian is a fit and proper person to be appointed.

Co-respondent guardian not necessary.

And by rule 108, "It shall not be necessary for a minor who, as an alleged adulterer, is made a co-respondent in a suit, to elect a guardian or to have a guardian assigned to him for the purpose of conducting his defence."

Form of election of guardian by petitioner.

The following is a form of election of a guardian by a petitioner:—

FORM 20.

In the High Court of Justice,
Probate, Divorce and Admiralty Division.
(Divorce.)

The day of , 19 .

In the matter of the proposed petition of Peter Pontifex, of Frogthorpe, in the county of Norfolk, for Dissolution of Marriage.

WHEREAS a suit is about to be instituted in the Probate, Divorce and Admiralty Division of our High Court of

Justice on behalf of Peter Pontifex against Amelia Pontifex (the wife of the said Peter Pontifex) and Benjamin Buckenham. And whereas the said Peter Pontifex is now a minor (*or as the case may be*) of the age of twenty years and upwards, but under the age of twenty-one years, and therefore by law incapable of acting in his own name. Guardianship.

Now I, the said Peter Pontifex, do hereby make choice and elect James Pontifex, my natural and lawful father and next of kin, to be my curator or guardian for the purpose of instituting the said suit, and for the purpose of carrying on and prosecuting the same until a final decree shall be given and pronounced therein, or until I shall attain the age of twenty-one years, and I hereby appoint Robert Charles Brown, of 225, Coleman Street, in the City of London, my solicitor, to file or cause to be filed this my election for me in the Divorce Registry of the said Division.

In witness whereof I hereunto set my hand and seal
this day of in the year 19 .

(Signed) PETER PONTIFEX. (L.S.)

Signed, sealed, and delivered by the
within-named Peter Pontifex in
the presence of .

If, on the other hand, the respondent happened to be the minor instead of the petitioner, the form of election would be as follows:—

Guardianship.

FORM 21.

Form of
election of
guardian by
respondent.

In the High Court of Justice,
Probate, Divorce and Admiralty Division.

(Divorce.)

The day of , 19 .

PONTIFEX (Peter)

v.

PONTIFEX (Amelia) and

BUCKENHAM (Benjamin),

or,

Between Peter PONTIFEX, petitioner,
Amelia PONTIFEX, respondent, and
Benjamin BUCKENHAM, co-respondent.

WHEREAS a citation bearing date the day of ,
19 , has issued under the seal of the High Court of
Justice, Probate, Divorce and Admiralty Division, at the
instance of Peter Pontifex, of Frogthorpe, in the county
of Norfolk, claiming to have been lawfully married to
Amelia Pontifex (formerly Amelia Acle, spinster), citing
the said Amelia Pontifex to appear in the said Court, and
then and there to make answer to a certain petition of the
said Peter Pontifex filed in the Divorce Registry of the
said Court. And whereas the said Amelia Pontifex is
now a minor of the age of twenty years and upwards (*or
as the case may be*), but under the age of twenty-one years,
and therefore by law incapable of acting in her own name.

Now I, the said Amelia Pontifex, do hereby make choice
of and elect Andrew Acle, my natural and lawful father
and next of kin, to be my curator or guardian for the
purpose of entering an appearance for me and on my
behalf in the said Court, and for the purpose of making
answer for me to the said petition, and of defending me in
the said cause, and to abide for me in judgment until a
final decree shall be given and pronounced therein, or until
I shall attain the age of twenty-one years, and I hereby
appoint William White, of 66, Frederick's Place, Old

Jewry, in the City of London, my solicitor, &c. (*conclude as in Form 20*). Guardianship.

The following is a form of acceptance of the guardianship by the proposed guardian:— Form of acceptance of guardianship.

FORM 22.

[*Heading as in Form 20.*]

WHEREAS Peter Pontifex, of Frogthorpe, in the county of Norfolk, is about to institute proceedings in the Probate, Divorce and Admiralty Division of his Majesty's High Court of Justice for dissolution of his marriage with Amelia Pontifex by reason of her adultery with Benjamin Buckenham; and whereas the said Peter Pontifex is now a minor, of the age of twenty years and upwards, but under the age of twenty-one years (*or as the case may be*), and therefore by law incapable of acting in his own name, and whereas the said Peter Pontifex has elected me, the undersigned James Pontifex, his natural and lawful father and next of kin, to be his curator or guardian for the purpose of instituting his said suit and for the purpose of carrying on and prosecuting the same until a final decree shall be given or pronounced therein or until he shall attain the age of twenty-one years, as appears by his election filed in the Divorce Registry of the said Division.

Now I the said James Pontifex do hereby declare that I expressly consent to accept the said election of appointment of curator or guardian, for the purpose aforesaid; and I do hereby appoint Robert Charles Brown, of 225, Coleman Street, in the City of London, my solicitor, to file or cause to be filed this my consent for me in the said registry. In witness whereof I have hereunto set my hand and seal this day of 19 .

JAMES PONTIFEX.

Signed, sealed, &c.,
in the presence of .

[None of the three above forms require more than one witness.]

Guardianship. If the cause of the assignment is that the party is a lunatic or an invalid, the above forms must be altered accordingly.

Lunatics and
invalids.

By rule 196, "A committee duly appointed of a person found by inquisition to be of unsound mind may take out a citation and prosecute a suit on behalf of such person as a petitioner, or enter an appearance, intervene, or proceed with the defence on behalf of such person as a respondent; but if no committee should have been appointed, application is to be made to one of the registrars, who will assign a guardian to the person of unsound mind, for the purpose of prosecuting, intervening in, or defending the suit on his or her behalf; provided that if the opposite party is already before the Court when the application for the assignment of a guardian is made, he or she shall be served with notice by summons of such application."

[No order should be made under this rule if there is a *bonâ fide* doubt as to the insanity of the patient: *Fry v. Fry* (1890), 15 P. D. 50; 59 L. J. P. 43; 62 L. T. 501.]

If a petitioner is so completely invalidated as to be unable to commence or prosecute a suit personally, the registrar will assign a guardian to act on his or her behalf.

Summons
necessary;

The application, at all events where there is any other party before the Court, must be made on summons supported by affidavits, which must show the actual condition of the lunatic or invalid, so as to satisfy the registrar of his or her inability to act personally, and also of the fitness of the proposed guardian.

but not in
case of minor.

It will be seen that there is an important difference between the case of a minor and that of a lunatic or invalid: for whereas in the former case the Court will appoint a guardian merely on the application of the petitioner supported by affidavit, in the two latter cases the proceeding must be by summons.

By rule 106, "The necessary instrument of election must be filed in the registry before the guardian elected can be permitted to extract a citation or to enter an appearance on behalf of the minor."

Guardianship.

Instrument of election must be filed in the Divorce Registry. Petition by minor, how signed. Affidavit in support; *ibid.*

When the guardian *ad litem* has been duly elected and assigned, the petition is signed by the petitioner, and also by the guardian; but the affidavit in support is made by the petitioner only.

[Where a wife petitioner in a suit for dissolution was confined in a lunatic asylum, and the superintendent of such asylum, acting under instructions from the Commissioners of Lunacy, refused to allow her to be seen for the purpose of swearing the affidavit in support of her petition, the Court ordered the Commissioners to authorize the superintendent to allow her to swear the affidavit forthwith: *Beecham, Ex parte*, (1901) P. 65; 70 L. J. P. 20; 84 L. T. 63.]

The petition for dissolution should be intituled in the following form:—

Petition by minor, title of.

FORM 23.

In the High Court of Justice,

Probate, Divorce and Admiralty Division.

To the Right Honourable the President of the said Division.

The day of , 19 .

The petition of Peter Pontifex, of Frogthorpe, in the county of Norfolk (a minor suing by his guardian, James Pontifex), sheweth:—

After the petition is filed, all subsequent proceedings in the cause should be entitled in either of the following ways:—

Ibid. of cause after petition filed.

Guardianship.

FORM 24.

In the High Court of Justice,
Probate, Divorce and Admiralty Division.

(Divorce.)

PONTIFEX, Peter (by his guardian, James Pontifex)

v.

PONTIFEX, Amelia, and BUCKENHAM, Benjamin,

or,

Between Peter PONTIFEX (by his guardian, James
Pontifex), petitioner,

Amelia PONTIFEX, respondent, and

Benjamin BUCKENHAM, co-respondent.

[If the minor be a respondent, this heading must be altered accordingly.]

Next of kin
renouncing
guardianship.

If the next of kin objects to act as guardian, he should
renounce his right to the guardianship.

Any form of renunciation that is sufficiently explicit
will suffice; the following is merely suggested:—

FORM 25.

[Heading as in Form 20.]

Whereas I, James Pontifex, am the natural and lawful
father and only next of kin of the above-named Peter
Pontifex, who is now a minor; now I do hereby renounce
all right and title to act as curator or guardian of the said
Peter Pontifex.

(Signed) JAMES PONTIFEX.

[In the presence of one witness.]

The order assigning a guardian will be somewhat after Guardianship.
the following form:—

FORM 26.

[*Heading as in the application or summons, if any.* Order
See title "Practice as to Motions and Summonses," assigning
post, p. 511.] guardian,
form of.

Upon hearing the solicitor for James Pontifex and the petitioner, and upon reading the affidavit of the said James Pontifex (and of , *if any other affidavits have been filed*), I do order that the said James Pontifex be appointed guardian of the said petitioner for the purpose of prosecuting a suit for dissolution of marriage for and on behalf of the said petitioner.

If the guardian *ad litem* dies pending suit before the petitioner attains the age of twenty-one years, or recovers his or her health, it is necessary to apply for another guardian to be appointed. Guardian
dying pend-
ing suit.

This is done on summons supported by affidavits showing the death of the guardian, and that the petitioner is still a minor, or still incompetent to act personally from lunacy or ill-health.

If a minor petitioner attains the age of twenty-one years, or a lunatic or invalid recovers and becomes mentally and bodily competent pending suit, the functions of the guardian are at an end. The petitioner should then take out a summons calling on the other side to show cause why the order assigning the guardian should not be rescinded. Minor
attaining age
of twenty-one
years, or
lunatic or
invalid
recovering
pending suit.

FEES.

	£	s.	d.
For each and every document filed . . .	0	2	6

[The following costs will most probably
be allowed on taxation]:—

Instructions for election . . .	0	6	8
---------------------------------	---	---	---

Guardianship.

Drawing form (as in Form 21) (per folio	£	s.	d.
of 72 words)	0	1	4
Copy same (per folio of 72 words)	0	0	4
Attending obtaining petitioner's signature	0	6	8
Attending filing in registry	0	6	8

[The above figures are taken from Johnson's Bills of Costs, second edition, London, Sweet and Maxwell, Limited, 1901. See further as to fees and costs, post, pp. 540—603.]

AMEND-
MENT OF
PLEADINGS.

Formerly the amendment of petitions and other pleadings was regulated entirely by rule 34, which is in the following terms:—

Amending
petition.

“ Either party desiring to alter or amend any pleading must apply by motion to the Court for permission to do so, unless the alteration or amendment be merely verbal, or in the nature of a clerical error, in which case it may be made by order of the judge-ordinary, or of one of the registrars in his absence, obtained on summons.”

Rule 187.

But by rule 187, promulgated July 14, 1875, “ Either of the parties before the Court, desiring to alter or amend a pleading, may apply by summons to one of the registrars for an order for that purpose.”

Effect of
rule 187
to give
registrars
complete
jurisdiction as
to amendment
in first
instance.
Appeal to
judge, &c.

The effect of this rule has been to substitute the simpler form of procedure by summons for the more complicated form of procedure by motion, and also to give the registrars jurisdiction in the first instance over all questions of amendment of pleadings.

From the decision of the registrar an appeal lies, first to the judge in chambers, secondly to the judge by motion, and so on to the Court of Appeal, and ultimately to the House of Lords. (See *post*, titles “ Practice as to Motions and Summonses,” p. 511, and “ Appeal,” p. 525.)

Amendment
verbal or in

Where an error in a petition or other pleading is “ *merely verbal, or in the nature of a clerical error* ” (see

rule 34), as where the name of any of the parties has been wrongly spelt, or where the names of the petitioner and respondent, or the date or place of their marriage, have been wrongly set out in the petition, and other mere clerical errors, are allowed to be rectified by a registrar's order.

**Amendment
of Pleadings.**

the nature of
a clerical
error.

But no amendment of any pleading may be made without an order. In the case of a clerical error, this order is obtained without summons (see rule 34) on application to a registrar, supported by an affidavit, showing how the mistake arose, which should be made by the person responsible for it.

Order for,
how obtained.

If it was through the fault of the petitioner, the affidavit should be made by the petitioner personally. If, on the other hand, it was through the fault of the petitioner's solicitor or one of his clerks, then the affidavit should be made by such solicitor or clerk.

Affidavit
necessary ;
by whom
made.

The following form of affidavit is suggested:—

FORM 27.

In the High Court of Justice,
Probate, Divorce and Admiralty Division.
(Divorce.)

Affidavit in
support of
application
for leave to
amend.

TROWSE (Timothy)

v.

TROWSE (Charlotte) and
MARSHLAND (Robert),

or,

Between Timothy TROWSE, petitioner,
Charlotte TROWSE, respondent, and
Robert MARSHLAND, co-respondent.

[If the affidavit is sworn by the petitioner personally, it should commence "I, Timothy Trowse, &c.," as in Form 7.]

1. That being under the mistaken impression that I

Amendment
of Pleadings.

was married on March 19th, 1900, I instructed my solicitor that I was married on that date, whereas as a matter of fact, I was married on March 19th, 1901.

2. That the mistake arose solely through my neglecting to refer to a copy of my marriage certificate which was in my possession, and also neglecting to take the said copy certificate with me when I instructed my solicitor to file the petition in this suit, and from no other cause (*or as the case may be*).

Sworn, &c.

(Signed) TIMOTHY TROWSE.

[*Or, if the affidavit is by the petitioner's solicitor or a clerk*],

I, A. B. (*or* C. D., managing clerk to A. B.), of 25, — Street, in the City of London, solicitor for the petitioner in the above cause, make oath and say as follows:—

1. That I have by mistake alleged in the petition that the petitioner and respondent were married on March 19th, 1900, whereas the correct date, as appears from a copy of the marriage certificate now before me, is March 19th, 1901.
2. That the mistake arose through my neglecting to inform the petitioner that he must supply me with a copy of the marriage certificate or else instruct me to procure one, for the purposes of this suit, and from no other cause (*or as the case may be*).

Sworn, &c.

(Signed) A. B.
or
C. D.

Amendment
by adding
charges
committed
before date
of petition

Where it is desired to amend a petition by adding charges of acts of adultery, &c. committed by the respondent before the date of the petition, but only discovered by the petitioner and his advisers after it has been filed,

a summons under rules 34 and 187 becomes necessary; *except where the opposite party has entered no appearance, and the petitioner is proceeding in default (see post, p. 370), in which case the order is usually made by the registrars without summons, on an affidavit commencing as in Form 27, setting out the fresh charge or charges it is proposed to make (or as the case may be), and explaining the reasons why they were not included in the original petition, &c.*

Amendment
of Pleadings.

but discovered
after filing.

Sometimes it is desired to amend a petition not by adding a fresh charge, but by striking out one already in the petition, or a claim for damages.

Amendment
by striking
out.

The summons should be to show cause why the petition should not be amended by adding fresh charges, or withdrawing a claim for damages, or striking out (say) paragraphs 5 and 6, *or as the case may be.*

Form of
summons.

If the amendment asked for should happen to be to strike out a co-respondent, on the ground that there is not sufficient evidence against him, such co-respondent will be allowed his costs (see *ante*, Chap. XVI., p. 228) on applying for them. (See *post*, tit. "Practice as to Costs," p. 540.)

Striking out
co-respon-
dent.

[*For the full form of summons, see title "Practice as to Motions and Summonses," post, p. 511.*]

The terms of the amendment are set forth in the order, but all amendments have to be made in the Divorce Registry.

The solicitor attends at the Divorce Registry, Room No. 38, with the order, and makes the amendment in accordance with its terms, in the presence of one of the clerks in red ink. He then writes a marginal note, also in red ink, "Amended pursuant to the order of _____, dated _____," which is duly initialled by the clerk.

Mode of
amendment.

If, on the other hand, it is desired to add charges committed after the date of the original petition, it becomes necessary to file a supplemental petition.

Supplemental
petition.

**Amendment
of Pleadings.**

Leave to file,
how obtained.

Leave to file a supplemental petition must be obtained on summons before one of the registrars, if any of the parties charged have entered an appearance. If no appearance has been entered, leave can be obtained without summons, upon an affidavit of the petitioner in support of the application swearing to his belief in the truth of the proposed charges, and stating that no appearance has been entered.

Amendment
in supple-
mental
petition.

Every fresh charge, whether alleged by way of amendment or in a supplemental petition, must be verified by affidavit, as in the case of an original petition.

Must be
supported by
affidavit as to
petitioner's
belief, &c.

In every such affidavit the petitioner must swear to his belief in the truth of the charges he desires to add, and state when they first came to his or her knowledge.

Affidavit
must deny
collusion and
connivance.

The petitioner must also swear that there is no collusion or connivance between him (or her) and the respondent, as in Forms 7 and 29, pp. 298 and 334.

Supplemental
petition,
form of.

The following is a form of supplemental petition:—

FORM 28.

In the High Court of Justice,
Probate, Divorce and Admiralty Division.
(Divorce.)

To the Right Honourable the President of the said
Division.

The day of , 19 .

TROWSE (Timothy)

v.

TROWSE (Charlotte) and
MARSHLAND (Robert),

or,

Between Timothy TROWSE, petitioner,
Charlotte TROWSE, respondent, and
Robert MARSHLAND, co-respondent.

The supplemental petition of Timothy Trowse, of 125,

King Edward's Hill, Yarmouth, in the county of Norfolk, Amendment
of Pleadings.
showeth—

1. That on the 3rd, 4th, and 5th days of May, 19 , Supplemental
petition,
form of.
the said Charlotte Trowse (*or* "the respondent"),
at 125, King Edward's Hill aforesaid, committed
adultery with the said Robert Marshland (*or* "the
co-respondent").
2. That on or about the 29th day of May, 19 , the
said Charlotte Trowse (*or* "the respondent"), at
"The Grey Mare Inn," Frogthorpe, in Norfolk
aforesaid, committed adultery with Benjamin
Buckenham.
3. That on or about the 6th day of June, 19 , the
said Charlotte Trowse (*or* "the respondent"), at
"The Loke Cottage," St. Mary-in-the-Marsh, in
the county of Suffolk, committed adultery with
Benjamin Buckenham.

[If there is no possible doubt about a particular date, it is futile to use the words "on or about," which directly invite a summons for particulars (as to which, see post, pp. 361—367). Very frequently, however, in spite of every precaution, unless it is a case where there are "hotel books" or like documents to refer to, it turns out that the evidence is wrong as to a day or two. In such a case the introduction of the words "on or about" is of the greatest possible value, and it is better to risk a summons for particulars than to omit them.]

Wherefore your petitioner humbly prays as before.

TIMOTHY TROWSE.

As in the case of an original petition, every amended or supplemental petition must be supported by an affidavit verifying the same. Amended or
supplemental
petition must
be supported
by affidavit.

In the case of an amended petition, this affidavit, allowing for the necessary verbal alterations, is the same as in Form 7, *ante*, p. 298. The paragraph stating that there

Amendment of Pleadings. is no collusion or connivance between the parties must in no case be omitted.

FORM 29.

Affidavit in support of Supplemental Petition.

Supplemental
petition,
affidavit in
support.

[Heading and commencement as in Form 6, adding the word "supplemental" before the word "petition."]

1. That the statements contained in paragraphs 1, 2, and 3 of the supplemental petition filed herein, and dated the day of , 19 , are true, to the best of my knowledge, information, and belief.
2. *[As in Form 7, para. 3, ante, p. 299.]*

Sworn, &c.

(Signed) TIMOTHY TROWSE.

Service of
amended
pleadings.

By rule 36, "A copy of every pleading showing the alterations and amendments made therein shall be delivered to the opposite parties on the day such alterations and amendments are made in the pleadings filed in the registry; and the opposite parties, if they have already pleaded in answer thereto, shall be at liberty to amend such answer within four days, or such further time as may be allowed for the purpose."

[This means by leaving them at the address supplied for the purpose of service. See rules 39 and 114, post, p. 355.]

Re-service of
amended
petition.

Every amended petition must be personally re-served in the same manner as citation and original petition (*see ante, pp. 301—308*), unless the Court should dispense with such re-service for good cause shown; except where the amendment consists merely in some trifling clerical error, that cannot possibly affect the charges against the opposite parties. In such case it will suffice to leave a

copy of the amended petition at the address given for service. (*See rules 39 and 114, post, p. 355.*)

Amendment
of Pleadings.

[Where there was only one charge of adultery in the petition, and such charge was wrongly dated, the Court allowed the petition to be amended by inserting the correct date, but refused to dispense with re-service. In this case the petition had been duly served, but the respondent had not appeared. (*Charter v. Charter* (1889), 58 L. J. P. 44; 63 L. T. 872.)]

Supplemental petitions must in every case be re-served, in the same manner as the citation and original petition (*see ante, pp. 301—308*), unless the Court should otherwise order.

Re-service of
supplemental
petition.

All applications for substituted service of an amended or supplemental petition must be made by motion, and the practice with respect to them is the same as in the case of original citations and petitions. (*See ante, pp. 308—316.*)

Substituted
service of
amended or
supplemental
petition.
Re-service
only necessary
on persons
affected by
amendment.

Only parties affected by any amended or supplemental petition need be re-served.

In the supposititious case before us, a citation has already issued against Charlotte Trowse and Robert Marshland. A further charge of adultery is made against Robert Marshland, and two fresh charges of adultery are made against Charlotte Trowse with an entirely new correspondent named Benjamin Buckenham. It will be necessary to extract a fresh citation against Benjamin Buckenham (*for practice, see ante, pp. 301—308*), and this citation and a copy of the amended petition under seal (rule 11) will have to be personally served upon him, unless an order for substituted service be obtained. Copies of the supplemental petition under seal (rule 11) will have to be served on Charlotte Trowse and Robert Marshland, but it will not be necessary to extract any further citation against them.

Amended or
supplemental
petition,
form of.

It is not necessary to serve personally an order giving leave to amend or to file a supplemental petition.

Order for
amended or
supplemental
petition.

Amendment
of Pleadings.

Amendment
by striking
out charge;
no re-service
necessary.

Where a petition has been amended by striking out a charge, no personal re-service is necessary; but the alteration is brought to the knowledge of the opposite party by leaving a copy of the amended petition at the address given for service. (*See rule 36, p. 334, and rules 39 and 114, post, p. 355.*)

Affidavit of
service of
amended or
supplemental
petition.

An affidavit of service of an amended or supplemental petition is always required.

[Such affidavit will be in the same form as the "Affidavit of Service of Citation," given in Form 15, ante, p. 307, substituting the words "amended petition" or "supplemental petition" for the word "citation."]

Amended
petition.
Costs not
allowed.

No costs of amending a petition are allowed, except under very special circumstances, as, for example, if it can be shown that the petitioner was prevented from ascertaining the facts earlier through the deliberate act of one or other of the opposing parties.

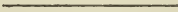
Fees.

FEEES.

	£	s.	d.
Amending	0	2	6
Office copy, if five folios or under	0	2	6
<i>[Above five folios, 6d. per folio extra.]</i>			
Collating and certifying, if ten folios or under	0	2	6
<i>[Above ten folios, 3d. per folio extra.]</i>			
Sealing	0	5	0

Supplemental
petition.
Fees and
costs.

The fees and costs allowed on taxation on a supplemental petition are about the same as those allowed in the case of an original petition. (*See ante, pp. 315—319, and post, pp. 568—603.*)



By rule 17, "Before a petitioner can proceed, after having extracted a citation, an appearance must have been entered by or on behalf of the respondents, or it must be shown by affidavit, filed in the registry, that they have been duly cited, and have not appeared."

**APPEAR-
ANCE.**

By rule 20, "An appearance may be entered at any time before a proceeding has been taken in default, or afterwards, as hereinafter directed, or *by leave*;" and by rule 185, made 14th July, 1875, "Application for leave to enter an appearance after a proceeding has been taken in default heretofore made to the Court on motion in pursuance of rule 20 shall hereafter be made by summons before one of the registrars."

When to be
entered.

[The time generally specified in the citation for appearance is eight days, but where the party cited is abroad it is extended. (*Robotham v. Robotham* (1858), 1 S. & T. 73; 27 L. J. P. 33.)]

Appearance,
time for.

Where the party cited is abroad, or there is any other special reason for extending the time, the time in which such party shall appear is specified in the citation itself; and it is now held that, taking into consideration rules 17 and 20, the filing of affidavits in compliance with rule 17 is a *proceeding in default* within the meaning of rule 20.

Affidavit of
non-appear-
ance.

The petitioner is at liberty to file the affidavit mentioned in rule 17 after the expiration of whatever may be the time mentioned for the appearance of the respondent in the citation (it is usually eight days), which by rule 123 must be exclusive of Sundays, Christmas Day, and Good Friday. It would seem to be the intention of the rules that there should be an affidavit of personal service as to, or an appearance by, each party cited; therefore, in case of appearance by one of the parties and no appearance by another, an affidavit of personal service as to the party who does not appear must be filed. If no appearance is

When to be
filed.

No appear-
ance entered,

Appearance.
proceeding
by default.

entered by any party, you can at once, on filing affidavit of service of citation and of search for appearance, proceed in default by leaving your application for the registrar's certificate that the pleadings are in order (*as to which, see post, pp. 368—374*), and, if granted, set the cause down for hearing, when it will be taken in its order, as undefended.

FORM 30.

Affidavit of Search for Appearance.

Affidavit of
search for
appearance,
form of.

[*Commencement as in Form 15, ante, p. 307.*]

I, Robert Charles Brown, of 225, Coleman Street, E.C., in the city of London, solicitor for the petitioner in the above cause, make oath and say, that I did on the day of _____, one thousand nine hundred and five, search the book kept in the Divorce Registry of the High Court of Justice for entering appearances by or on behalf of parties cited, to ascertain whether or not any appearance has been entered by or on behalf of Charlotte Trowse, the respondent (*or* Robert Marshland, the co-respondent) in this cause, and that I find no appearance has been entered by or on behalf of the said Charlotte Trowse (*or* Robert Marshland).

Sworn, &c.

[The affidavit as to search for appearance must be filed as to the co-respondent (if any) as well as the respondent, and in all cases, whether the service be personal or substituted: *Cooke v. Cooke and Lucy* (1859), 28 L. J. P. 56. It must also state whether the party served is respondent or co-respondent: *Temple v. Temple and Laing* (1861), 31 L. J. P. 34.]

Appearance
by leave of
Court after
proceeding in
default.

A consent order, or a summons before a registrar under rule 185, for leave to enter an appearance may issue *after a proceeding in default* has been taken. Indeed, applica-

tion may be made at any stage of the cause for leave to Appearance.
appear.

By rule 19, "All appearances to citations are to be entered in the registry in a book provided for that purpose."

Ibid.

And by rule 21, "Every entry of an appearance shall be accompanied by an address, within three miles of the General Post Office."

Entry of, in
book at
Divorce
Registry.
Address
within three
miles of
General Post
Office.

FORM 31.

Entry of an Appearance to "Citation," or "to Petition for Alimony *pendente lite*," "Permanent Alimony," "Variation of Settlements," or "by Intervener" (or as the case may be).

In the High Court of Justice,
Probate, Divorce and Admiralty Division.
(Divorce.)

Entry of
appearance,
form of.

Timothy Trowse, petitioner,
against

Charlotte Trowse, respondent, and
Robert Marshland, co-respondent.

The respondent, Charlotte Trowse (or the co-respondent, Robert Marshland), appears in person (or Frederick Jones, the solicitor for Charlotte Trowse, the respondent (or Robert Marshland, the co-respondent), appears for the said respondent or co-respondent).

[Here insert the address required within three miles of the General Post Office.]

Entered this day of , 19 .

Must be
entered
by party or
solicitor.

An appearance must be entered by the party in person or by his or her solicitor.

The party (or his or her solicitor) attends at the Divorce Registry at Somerset House (Room 38), and enters the appearance in a book kept for the purpose under rule 19.

At Somerset
House.

Appearance.

**Affixing
stamps and
indexing.**

**Appearance
to citation
sufficient.**

Notice.

He affixes the stamps to the form, and enters the name of the cause in the index book, in the presence of a clerk.

Forms are supplied in the Divorce Registry, Room 43.

An appearance to the citation in the cause is sufficient for all purposes, and covers all subsequent proceedings.

Notice of appearance should be given to the opposite party.

**Amending
appearance.**

If it should become necessary to amend an appearance, the practice is the same as in the case of amending petition and other pleadings. (*See ante*, pp. 328—334.)

Fees.**FEEES.**

	£	s.	d.
Entering appearance	0	2	6
Amendment	0	2	6
Search for	0	1	0

**Allowed on
taxation.**

The following costs will probably be allowed on taxation:—

Petitioners—

Search	0	6	8
------------------	---	---	---

Respondent, co-respondent or intervener—

Entering	0	6	8
Notice (drawing, &c. and serving)	0	4	0

[*But see post*, pp. 568—603.]

**Parties not
appearing
heard as to
custody of
children and
costs.**

Either the respondent or co-respondent in a cause, after entering an appearance without filing an answer to the petition, may be heard in respect of any question as to costs, and is entitled to be served with notice of all proceedings; and a respondent who is husband or wife of the petitioner may also be heard on any question as to alimony or custody of children, but not on any other matters.

[The Court has given leave to a husband respondent to attend before the registrar on the taxation of his wife's

costs, although he had entered no appearance. (*Letts v. Letts* (1869), L. R., 2 P. & D. 16.) Appearance.

For the position of a husband who has not entered an appearance in the cause, with respect to appearing to subsequent petitions for alimony, maintenance, or variation of settlements, see post, tits. "Practice as to Alimony and Maintenance" and "Practice as to Variation of Settlements."]

Where a respondent or intervener is a minor, it is necessary for him to appear by a guardian *ad litem*. (*As to co-respondent, see rule 108, ante, p. 320.*) Minor guardian.

The practice as to election of guardians in such a case is the same as in the case of a petitioner. (*See ante, pp. 319—328.*) Practice as to election.

The forms also are the same (*see ante, pp. 320—327*), merely substituting the words "respondent," "co-respondent," or "intervener" for the word "petitioner." Form of election.

[But a party cited cannot in any case appear by a guardian not regularly elected. (*Wells v. Cottam* (falsely called *Wells*) (1863), 3 S. & T. 367; 33 L. J. P. 41; 10 L. T. 138.)]

(*For the practice when a party appears under protest and files an "act on petition," see post, pp. 395—404.*) Act on petition.

By rule 39, "It shall be sufficient to leave all pleadings and other instruments, personal service of which is not expressly required by these rules and regulations, at the respective addresses furnished by, or on behalf of, the several parties to the cause." (*See also rule 114, post, p. 355.*) Service of pleadings, when not personal.

By rule 28, "Each respondent who has entered an appearance may within twenty-one days after service of citation on him or her file in the registry an answer to the petition." ANSWER.
Time for filing.

Answer.	This twenty-one days is reckoned exclusive of Sundays, Christmas Day and Good Friday, and also of the day of service.
How reckoned.	
Where special time allowed for appearing.	By rule 186, "Where the time allowed for entry of appearance is more than eight days, a respondent who has entered an appearance may, within fourteen days from the expiration of the time allowed for the entry of appearance, file in the registry an answer to the petition."
Extended time for appearance to citation.	The time for appearance is extended whenever the citation has to be served abroad, and, possibly, under other very special circumstances, such as where the party to be served is on the high seas and is expected to land in England on a certain day.
Some of the times usually allowed.	In every case such extended time is specified in the citation, and is reckoned according to the distance from the place at which service is to be effected, or as the case may be. If the service is to be effected in France, fourteen days is usually allowed, twenty-one days for Malta, thirty days for America, and two calendar months for India and Australia, and ninety days for Africa.
Varied according to postal arrangements and other circumstances.	But these figures, though representing the times usually allowed, are varied according to circumstances, and, in every case, postal arrangements, distances from towns and railways, and other matters of a like kind. For instance, sixty days has been allowed for America, in a case where it was shown by affidavit that the party resided in a place very difficult of access.
Filing answer where extended time allowed.	The answer must be filed within fourteen days after the extended time allowed for appearance (r. 186, <i>supra</i>); so that if the citation allowed fourteen days for appearance, the answer would have to be filed within twenty-eight days (<i>exclusive of Sundays, Christmas Day and Good Friday, and the day of service</i>) from the date of service.
Relief by answer.	By section 2 of the Matrimonial Causes Act, 1866 (29 Vict. c. 32), "In any suit instituted for dissolution of

marriage, if the respondent shall oppose the relief sought on the ground in case of such a suit instituted by a husband of his adultery, cruelty, or desertion, or in case of such a suit instituted by a wife on the ground of her adultery or cruelty, the Court may in such suit give to the respondent, on his or her application, the same relief to which he or she would have been entitled in case he or she had filed a petition seeking such relief."

Answer.

Previous to the passing of this statute there was an important distinction between answers in suits for dissolution and in those in other suits. The Ecclesiastical Courts, whose powers and principles are transmitted to the present Court (Matrimonial Causes Act, 1857, s. 6; 20 & 21 Vict. c. 85), possessed a power of giving relief to a respondent, if the answer contained a prayer for it; and consequently the Divorce Court always had, in suits other than for dissolution, the power of giving relief when prayed for in the answer. For instance, to a petition for restitution of conjugal rights, an answer might be filed, alleging adultery against the petitioner, and praying for a judicial separation; and on such an answer the Court could, and frequently did, give the respondent the relief desired. But it was otherwise in dissolution, where the only authority of the Court was that given by statute; and as there was no power given to the Court, except to grant or reject the prayer of the *petition*, the Court could never grant relief to a *respondent*.

Practice
before 1866.

The only way in which a respondent could obtain any relief in a suit for dissolution other than the dismissal of the petition was to commence a cross suit, which is still occasionally done, in which case the two suits are consolidated.

Cross suits.

Consolidation.

[For the practice as to consolidation, see post, pp. 367, 368.]

Answer. The following forms of answers and other pleadings will be found useful as precedents in suits for dissolution:—

Answers,
forms of.

FORM 32.

Commencement of Answer.

Commence-
ment of
answer,
form of.

In the High Court of Justice,
Probate, Divorce and Admiralty Division.

(Divorce.)

(If the petition be by the husband:)

The day of 19 .

TROWSE (Timothy)

v.

TROWSE (Charlotte) and

MARSHLAND (Robert),

or,

Between Timothy TROWSE, petitioner,
Charlotte TROWSE, respondent, and
Robert MARSHLAND, co-respondent.

[If the petition be by the wife:]

TROWSE (Charlotte)

v.

TROWSE (Timothy),

or,

Between Charlotte TROWSE, petitioner, and
Timothy TROWSE, respondent.

The respondent, Timothy Trowse (*or* Charlotte Trowse,
or the co-respondent, Robert Marshland), by his (*or* her)
solicitor (*or* in person), in answer to the petition filed in
this cause, saith:—

FORM 33.

**Answer by a Wife to a Petition for Dissolution of
Marriage, claiming Relief.**

[Commence as in Form 32.]

1. That she denies that she committed adultery with
Robert Marshland, as set forth in the said petition.

By wife to
petition for
dissolution,
claiming
relief.

Denial.

2. The respondent further saith, that in or about the month of , 19 , at 125, King Edward's Hill, Yarmouth, in the county of Norfolk, the petitioner with his clenched fist struck the respondent in the eye. **Answer.**

Counter-charge of cruelty.

3. That in or about the month of , 19 , the said petitioner at , with his clenched fist, with great violence struck the respondent and knocked her down. *Ibid.*

4. That in or about the month of , 19 , the petitioner at pointed a loaded pistol at the respondent and threatened to murder her. *Ibid.*
Threat to murder.

5. That in and during the years 1903, 1904 and 1905, the said petitioner has habitually used coarse, violent and insulting language towards the respondent. *Ibid.*
Coarse, &c. language.

6. That by reason of the premises the respondent on or about the day of , 19 , left the said petitioner, and has never since returned to cohabitation with him. Paragraph alleging respondent compelled by petitioner's conduct to leave home.

7. That on or about the day of , 19 , at , the said petitioner committed adultery with Edith Haddiscoe. Counter-charge of adultery.

8. That on or about the day of , 19 , the said petitioner, at 562, Dereham Road, Norwich, in the county of Norfolk, committed adultery with a woman whose name is at present unknown to the respondent. *Ibid.*
Woman unknown.

9. That in or about the months of October, November and December, 19 , the said petitioner, at 125, King Edward's Hill, aforesaid, committed adultery with Jane Brundell, a servant then in the employ of himself and the respondent. *Ibid.*
Domestic servant.

10. That from about the month of October, 19 , to about the month of March, 19 , the petitioner, at 125, King Edward's Hill, aforesaid, lived and co- *Ibid.*
Habitua for months.

- | | |
|--|--|
| <p>Answer.</p> <hr/> <p>By wife,
form of.
Respondent
driven from
home by
threats.
Petitioner
persistently
refusing to
allow
respondent
to return.</p> <p>
Charge of
desertion.</p> <p>
<i>Ibid.</i>
Bigamy.</p> <p>
<i>Ibid.</i>
Adultery
after bigamy.</p> | <p>habited and habitually committed adultery with a woman named Bella Buckenham.</p> <p>11. That on or about the day of , 19 , the said petitioner, without reasonable cause, threatened the respondent that unless she forthwith left the house he would shut her up and keep her without food. That in consequence, the respondent was compelled to leave the said petitioner, and has ever since lived separate and apart from him, and that ever since the day of , 19 , the said petitioner has, though frequently requested to do so, persistently refused to allow the respondent to return to cohabitation with him.</p> <p>12. That on or about the day of , 19 , the said petitioner, without cause, deserted the respondent, and has never since returned to cohabitation with her, and that he has deserted the respondent without cause for the space of two years and upwards.</p> <p>13. That on or about the day of , 19 , at the parish church of Plymouth, in the county of Devon, the said petitioner went through a ceremony of marriage with Caroline Cantley, then of Plymouth, aforesaid, spinster (<i>or</i> “widow”), thereby committing the crime of bigamy.</p> <p>14. That afterwards the said petitioner at Plymouth, aforesaid, cohabited and habitually committed adultery with the said Caroline Cantley.</p> <p>(<i>Or</i>, that afterwards on divers occasions, between the said day of , 19 , and the day of , 19 , the said petitioner at in the county of committed adultery with the said Caroline Cantley.)</p> |
|--|--|

[It is not sufficient to charge bigamy only, adultery must be charged as well (*Bonaparte v. Bonaparte* (1891), 65 L. T. 795), and the adultery and bigamy must be with the same woman: *Horne v. Horne* (1858), 2 S. & T. 48; 27 L. J. P. 50; *Ellam v. Ellam* (1889), 58 L. J. P. 56; 61 L. T. 33.]

15. That in or about the month of January, 19 , at **Answer.**
 125, King Edward's Hill, aforesaid, the said peti- *Ibid.*
 tioner committed incestuous adultery with Rebecca Incestuous
 Reedham, the sister of the respondent. adultery.

16. That on the day of , 19 , at , in *Ibid.*
 the county of , the said petitioner committed Rape, or
 rape on the person of [or, committed "sodomy" unnatural
 or "bestiality"]. crime.

The respondent therefore humbly prays— **Prayer.**

That your Lordship will be pleased to reject
 the prayer of the said petition, and decree
 that her said marriage may be dissolved,
 and that she may have the custody of her
 said children, together with such other and
 further relief in the premises, as to your
 Lordship may seem meet.

(Or, in the alternative:—)

The respondent therefore humbly prays—

**Alternative
 form of
 prayer.**

That your Lordship will be pleased to reject
 the prayer of the said petition and decree
 her—

1. A dissolution of her said marriage.
2. The custody of her said children.
3. Such further and other relief as is
 meet.

[Answers need not be signed. Paragraphs 2 to
 16 (inclusive) of this form must be verified by
 affidavit. See Form 39.]

FORM 34.

Answer by a Wife to Husband's Petition, as in Form 2,
alleging various Defences, but not claiming
Specific Relief.

**Answer
 alleging
 various de-
 fences, but
 not claiming
 specific
 relief.**

[Commencement as in Form 32.]

1. (Denial as in Form 32.)

Denial.

- | | |
|-----------------------|---|
| <u>Answer.</u> | 2. That the petitioner condoned the acts of adultery (if any) alleged in the said petition. |
| Condonation. | |
| Connivance. | 3. That the petitioner has connived at the acts of adultery (if any) alleged in the said petition. |
| Collusion. | 4. That the said petition is collusive, and was presented (or prosecuted) by agreement between the petitioner, the respondent, and the co-respondent. |
| Unreasonable delay. | 5. That the petitioner has been guilty of unreasonable delay in presenting (or prosecuting) his said petition, for whereas the said supposed acts of adultery are alleged to have taken place in the year 19 , and in the months of January, February, and March, 19 , yet the petitioner did not file his petition until the day of , 19 . |
| Neglect or misconduct | 6. That the petitioner has been guilty of such neglect (or misconduct) as has conduced to the said alleged adultery (if any), inasmuch as (<i>here set out the facts relied on</i>). |

The respondent therefore humbly prays—

That your Lordship will be pleased to reject the prayer of the said petition, and that the respondent may have such further and other relief as is meet.

[*Answers need not be signed. Paragraphs 2 to 5 (inclusive) of this form must be verified by affidavit. See Form 39.*]

FORM 35.

Husband,
answer by.

Answer by Husband to a Wife's Petition, as in Form 3.

[*Commencement as in Form 32.*]

Denial.

1. That he denies that he has been guilty of the charges of adultery, cruelty, and desertion (*or as the case*

may be) alleged against him in the said petition, Answer.
or any of them.

[*The above is amply sufficient, but the charges can be categorically traversed, if preferred, as :*

“That he denies that he has been guilty of adultery, as alleged in paragraphs 8, 9, 10 and 11 of the said petition.

“That he denies that he has been guilty of cruelty, as alleged in paragraphs 3, 4, 5, 6 and 12 of the said petition.

“That he denies that he has deserted the petitioner, as alleged in paragraph 13 of the said petition.”]

2. That the petitioner condoned the acts of adultery (if Condonation.
any) alleged in the said petition.

3. That the petitioner condoned the acts of cruelty (if
any) alleged in the said petition.

[*Or, if preferred: “That as for the acts of adultery (or cruelty, or as the case may be) (if any) alleged in paragraphs 3, 4, 5, 6, 8, 9, 10, 11 and 12 of the said petition, the same were afterwards condoned by the petitioner.”]*

4. That the petitioner has connived at the adultery (if Connivance.
any) alleged in the said petition.

5. That as to the act of cruelty (if any) set forth in Justification.
paragraph 12 of the said petition, the respondent was provoked thereto by the threats and violence of the petitioner.

6. That he denies that he threatened the petitioner, or Denial.
in any manner, by threats or otherwise, compelled the petitioner to leave him, the said respondent, or to live separate and apart from him, as alleged in paragraph 7 of the said petition.

7. That he denies that since about the day
of , 19 , he has deserted the said petitioner,
as set forth in paragraph 13 of the said petition.

8. That by reason of the circumstances hereinafter set Justification.

Answer.

forth, the respondent had good and reasonable cause for living apart from the petitioner.

[Set forth here in numbered paragraphs any conduct of which the petitioner may have been guilty, justifying the husband in leaving her.]

Counter-charges.

If it is desired to make countercharges of adultery, cruelty, or bigamy (or as the case may be), see Form 33.

If the husband desires to claim relief by answer, conclude with prayer as in Form 33; if, on the other hand, he only asks that the petition may be dismissed, conclude with prayer as in Form 34.

Answers need not be signed. In the above form paragraphs 2, 3, 4, 5 and any subsequent paragraphs containing countercharges must be verified by affidavit. See post, p. 352.]

Husband respondent, citation by.

If a husband respondent countercharges the petitioner with adultery, the alleged adulterer must be made a co-respondent, a citation against him extracted, and a sealed copy of the answer served with it.

A copy of the petition is not served on the co-respondent, nor is any citation served on the petitioner.

FORM 36.

Citation by Respondent.

Respondent, citation by, form of.

To Robert Marshland, of The Loke Cottage, St. Mary-in-the-Marsh, in the County of Suffolk.

WHEREAS Charlotte Trowse, of The Loke Cottage aforesaid, claiming to have been lawfully married to Timothy Trowse, of 125, King Edward's Hill, Yarmouth, in the county of Norfolk, has filed her petition against him in the Divorce Registry of our said Court, praying for a dissolution of marriage, wherein she alleges that he has been guilty of adultery coupled with cruelty towards her.

AND WHEREAS the said Timothy Trowse has filed in the said registry his answer to the said petition, wherein he alleges that you have been guilty of adultery with the said Charlotte Trowse, and prays for a dissolution of marriage.

Answer.

NOW THIS IS TO COMMAND YOU, that within eight days after service hereof on you, inclusive of the day of such service, you do appear in our said Court, then and there to make reply to the said answer, a copy whereof sealed with the seal of the said Court is herewith served upon you. AND TAKE NOTICE, &c. (*as in Form 9, ante, p. 301*).

Citation by respondent.

[*For the practice as to citations, see ante, pp. 301—315.*]

FORM 37.

Title or Style of Cause after Adulterer has been cited by a Respondent claiming Relief by Answer.

Title of cause after citation of alleged adulterer.

TROWSE (Charlotte)

v.

TROWSE (Timothy) and

MARSHLAND (Robert), cited.

Or,

Between Charlotte TROWSE, petitioner,
Timothy TROWSE, respondent, and
Robert MARSHLAND, party cited.

[*It will be observed that the word "co-respondent" is not used.*]

A sealed copy of the answer must be served on the petitioner.

Sealed copy served on petitioner.

FORM 38.

Answer by Co-respondent.

Co-respondent, answer by.

[*Commence as in Form 32, and allege any counter-charges as in Forms 33 and 34, and add as a final paragraph:—*]

"That at the time when the co-respondent committed Denial of

Answer. the acts of adultery (if any) alleged in the said petition, he did not know that the respondent was a married woman.”

knowledge that respondent married woman.

[*Conclude with prayer as in Forms 33 or 34.*

Answers need not be signed, but all countercharges and final paragraph must be verified by affidavit. See Form 39.]

Affidavit in support of.

By rule 30, “Every answer which contains matter other than a simple denial of the facts stated in the petition, shall be accompanied by an affidavit made by the respondent, verifying such other or additional matter, so far as he or she has personal cognizance thereof, and deposing as to his or her belief in the truth of the rest of such other or additional matter, and such affidavit shall be filed with the answer.”

To contain denial of collusion or connivance ;

And by rule 31, “In cases involving a decree of nullity of marriage, or of judicial separation, or of dissolution of marriage, or a decree in a suit of jactitation of marriage, the respondent who is husband or wife of the petitioner shall, in the affidavit filed with the answer, further state that there is not any collusion or connivance between the deponent and the petitioner.”

but not in case of co-respondent.

It is not necessary for a co-respondent to deny collusion or connivance.

FORM 39.

Affidavit in support of Answer.

Affidavit in support of answer, form of.

(*See Forms 33, 34, and 35.*)

[*Commencement as in Form 7, ante, p. 298.*]

I, Charlotte Trowse, of The Loke Cottage, St. Mary-in-the-Marsh, in the county of Suffolk (*or* Timothy Trowse, of 125, King Edward’s Hill, Yarmouth, in the county of Norfolk), the respondent in the above cause (*or*, the above-named respondent), make oath and say as follows:—

1. That the allegations contained in paragraphs 2, 3, 4,

5, 6, 7, 11 and 12 (*or as the case may be*) of my answer dated the day of , 19 , are true. Answer.

[If this affidavit is supposed to be in answer to Form 34, the paragraphs will be 2, 3, 4, 5 and 6, that is the whole answer.]

2. That the allegations contained in paragraphs 8, 9, 10, 13, 14, 15 and 16 (*or as the case may be*) of my said answer are true to the best of my knowledge, information, and belief. *Ibid.*

3. That there is no collusion or connivance between me and the petitioner in any way whatever.

[If collusion or connivance be alleged in the answer, add the words, "otherwise than is in my said answer set forth."]

Sworn, &c.

(Signed) CHARLOTTE TROWSE.

[If either a respondent or co-respondent simply denies the charges in a petition, no affidavit in support of the answer is required. Such affidavit only becomes necessary where fresh matter in the shape of countercharges is introduced. In the above Form, therefore, there is no allusion to paragraph 1, which is usually a simple traverse of the charges in the petition.]

By sect. 28 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ". . . on every petition presented by a wife for dissolution of marriage the Court, if it see fit, may direct that the person with whom the husband is alleged to have committed adultery be made a respondent; . . ."

**INTER-
VENTION.**

By alleged
adulteress.

Intervention.

By rule 23, application for leave to intervene in any cause must be made by motion, supported by affidavit.

And by rule 24, every party intervening must join in the proceedings at the stage in which he (*or* she) finds them, unless it is otherwise ordered.

Application
no longer by
motion in
open Court.

This application is no longer made by motion in open Court in the first instance.

May be made
whether
charges in
petition or
answer claim-
ing relief.

It may be made equally whether the charge is made in an original petition, or where relief is claimed by answer as above.

Made to
judge in
chambers.

The party charged should apply to a judge in chambers by summons *ex parte*, for leave to enter an appearance as respondent.

[See post, *tit.* "*Practice as to Motions and Summonses*,"
p. 511.]

Appearance
and answer by
intervener.

On leave being granted the alleged adulteress will be in a position to file her answer and proceed in the suit subject to the limitation in rule 24, *supra*.

The title of the cause would then be as follows:—

FORM 40.

Title of cause,
alleged
adulteress
intervening.

[*If the intervention is in an original petition as in
Form 3.*]

TROWSE (Charlotte)

v.

TROWSE (Timothy) and

HADDISCOE (Edith), intervening as re-
spondent.

Or,

Between Charlotte TROWSE, petitioner,
Timothy TROWSE, respondent, and
Edith HADDISCOE, intervening as re-
spondent.

[If the intervention is in a case where relief is claimed by Intervention.
answer, as in Form 33.]

TROWSE (Timothy)

v.

TROWSE (Charlotte) and

MARSHLAND (Robert), and

HADDISCOE (Edith), intervening.

Or,

Between Timothy TROWSE, petitioner,

Charlotte TROWSE, respondent, and

Robert MARSHLAND, co-respondent, and

Edith HADDISCOE, intervening.

[Leave to intervene as above is only granted in suits for dissolution of marriage (*Farrell v. Farrell* (1897), 76 L. T. 167); neither will it be granted where countercharges only are made in answer, but no relief is claimed by the respondent: *Harrop v. Harrop*, (1899) P. 61; 68 L. J. P. 58; 80 L. T. 171; *Lowe v. Lowe*, (1899) P. 204; 68 L. J. P. 60; 80 L. T. 575. *The last of these two cases was decided in the Court of Appeal.*]

By rule 29, "Each respondent shall, on the day he or ANSWER.
she files an answer, deliver a copy thereof to the petitioner, Service of.
or to his or her proctor, solicitor, or attorney."

By rule 39, "It shall be sufficient to leave all pleadings Other
and other instruments, personal service of which is not pleadings,
expressly required by these rules and regulations, at the service of.
respective addresses furnished by or on behalf of the
several parties to the cause."

And by rule 114, "It shall be sufficient to leave all Notices.
notices and copies of pleadings and other instruments
which by these rules and regulations are required to be
given or delivered to the opposite parties in the cause, or
to their proctors, solicitors, or attorneys, and personal
service of which is not expressly required at the address

Answer, &c.
Service of.

furnished as aforesaid by the petitioner and respondent respectively."

Personal
service of
answer not
required.

It seems that personal service of the answer is not required. Except where the respondent claims relief by answer, a plain copy of the answer is sufficient for service. This should be served on the solicitor for the petitioner, or, if the petitioner conducts the suit in person, by leaving a copy at the address given in the petition. A copy of the affidavit verifying the petition need not be served.

The Act of Parliament enabling a respondent to claim relief by answer is silent on the point as to whether the service of such answer should be personal or not.

If the husband is the respondent, and in his answer he charges his wife with adultery, he must extract a citation against the alleged adulterer, which must be personally served on, and a sealed copy thereof delivered to him.

It is, however, most probable that, in every case where an answer contains countercharges, and no reply to such countercharges has been filed, the registrar will require an affidavit of personal service on the petitioner before granting his certificate, as to which, see post, pp. 368—374.

Filing or
serving
pleading, &c.
out of time,
or failing
to deliver
copy of, &c.

By rule 37, if either party in the cause fail to file or deliver a copy of the answer, reply, or other pleading, or to alter or amend the same, or to deliver a copy of any altered or amended pleading, within the time allowed for the purpose, the party to whom the copy of such answer, reply, or other pleading, or altered or amended pleading, ought to have been delivered, shall not be bound to receive it, and such answer, reply, or other pleading shall not be filed, or be treated or considered as having been filed, or be altered or amended, unless by order . . . to be obtained on summons. The expense of obtaining such order shall fall on the party applying for it, unless otherwise directed.

If, therefore, a respondent fails to file an answer within twenty-one days of service of citation (rule 27), or to

deliver a copy of such answer when filed on the day of filing to the petitioner or his solicitor (rule 28), such answer cannot be filed or served without leave obtained on summons under rule 37. Answer, &c.

If an answer is filed out of time, and the mistake is not noticed at the moment, it is bound to be discovered when the cause is set down, which cannot be done without a registrar's certificate that the pleadings are in order. (See post, pp. 368—374.) In that case leave must be obtained on summons for the pleading to remain as filed. Answer filed out of time received by mistake.

By rule 32, "Within fourteen days from the filing and delivery of the answer the petitioner may file a reply thereto, and the same period shall be allowed for filing any further pleading by way of rejoinder, or any subsequent pleading." **REPLY
AND SUBSE-
QUENT
PLEADINGS.**

In the Divorce Court, when a pleading denies the allegations of the previous pleading, the parties are considered at issue, and no joinder of issue is required. Time for filing.
Joinder of issue unnecessary.

Therefore a reply is only necessary when counter-charges, &c. are made by the respondent in his or her answer, or, in the case of a co-respondent, where he denies that he knew the respondent was a married woman, as in Form 38. Reply, when necessary.

It is unnecessary to file a reply where the answer is a simple traverse of the charges in the petition, or where the only other plea is a mere justification, as in Form 35, paragraphs 1, 5, 6, 8. When not necessary.

No leave to file a reply is necessary.

Reply and
subsequent
Pleadings.

Subjoined is a simple form of reply:—

FORM 41.

Reply,
form of.

Reply (or Replication).

[Commence as in Forms 32 or 37.]

The petitioner, by his (*or her*) solicitor, says—
That he (*or she*) takes and joins issue on the answer
of the respondent.

Or,

That he (*or she*) takes and joins issue on the 2nd,
3rd, and 4th paragraphs of the answer of the
respondent (*or as the case may be*).

[Add any further facts it is desired to plead,
and conclude, “Wherefore the petitioner
prays as before.”]

Reply to
answer
making
counter-
charges and
claiming
relief.

Of course, in cases where relief is claimed by answer, for
all practical purposes, a cross suit has been commenced.
In such a case something more than a mere traverse or
joinder of issue may become necessary. A reply to meet
such a case can easily be framed from one of the forms of
answer, given *ante*, pp. 344—350.

Rejoinder,

Rejoinders and all subsequent pleadings have to be filed
within fourteen days after answer. (*See rule 32, ante*,
p. 357.)

and subse-
quent
pleadings.

It is not thought necessary to give forms of “rejoinder”
or subsequent pleadings. The necessity for these very
seldom arises and, when it does, pleadings may easily be
framed from one or other of the above forms.

Title and
commence-
ment of.

The heading (or style and title) and commencement of
a rejoinder would be the same as that of a reply.

FORM 42.

Estoppel.
plea of.

Plea of Estoppel.

1. That the petitioner (*or respondent*) ought not to be
admitted to allege adultery committed by the

respondent with R. S. (*or* by the petitioner) as set forth in paragraphs 4, 5, and 6 of the petition (*or* answer) filed in this cause by reason that on the day of , 19 , the said petitioner (*or* respondent) filed a petition in the Probate, Divorce, and Admiralty Division of the High Court of Justice (*or* this honourable Court), praying for a dissolution of his (*or* her) marriage with the said respondent (*or* petitioner) on the ground that she had committed adultery with the said R. S. (*or* that he had committed adultery); and charged the said adultery in the same terms as it is now charged in paragraphs 4, 5, and 6 of the present petition (*or* answer) as aforesaid; that the said respondent (*or* petitioner) in her (*or* his) answer to the petition filed by the petitioner (*or* respondent) on the day of , 19 , as aforesaid, denied the adultery therein charged against her (*or* him); that the said cause was tried before the Right Honourable Sir Gorell Barnes, President of the said Division, on the day of , 19 , when his Lordship pronounced that the said alleged adultery had not been proved.

**Reply and
subsequent
Pleadings.**

By rule 33, "A copy of every reply and subsequent pleading shall, on the day the same is filed, be delivered to the opposite parties, or to their proctor, solicitor, or attorney."

**Directions for
serving
replication or
subsequent
pleading.**

The service is therefore the same as in the case of an answer.

Plain copies only need be delivered to the opposite side.

**Plain copies
only.**

The effect of filing or serving a reply on subsequent pleading out of time is the same as in the case of an answer. (*See ante*, p. 356.)

**Effect of
filing or
serving out
of time.**

Reply and
subsequent
Pleadings.

FEEES.

Fees.

£ s. d.

Filing answer, affidavit in support, or any
other pleading 0 2 6

Costs allowed
on taxation.

[The following costs will probably be allowed
on taxation:]

Instructions for defence 0 6 8
 Attending retaining counsel 0 6 8
 Paid retainer to counsel and clerk 1 3 6
 Perusing petition 0 6 8
 Attending entering appearance 0 6 8
 Notice of appearance 0 4 0
 Instructions for answer 0 6 8
 Drawing same and copy (if settled by
solicitor) 1 0 0
 Attending counsel with petition to settle 0 3 4
 Paid his fee and clerk (if answer settled by
counsel) 1 3 6
 Drawing affidavit in support of answer 0 13 4
 Attending respondent swearing 0 6 8
 Attending filing answer and affidavit 0 6 8
 Attending serving petitioner's solicitor 0 3 4

Reply.

Instructions for reply 0 6 8
 Drawing same (or 1s. per folio) 0 5 0
 Attending filing 0 6 8
 Attending serving respondent's (or co-
respondent's) solicitor 0 3 4

[But see further as to costs allowed on taxa-
tion, post, pp. 568—603.]

Reply settled
by counsel.

If a reply is settled by counsel, the costs (if allowed) are
the same as in the case of an answer.

By rule 187, promulgated in 1875, in substitution for rule 34, "Either of the parties before the Court desiring to alter or amend a pleading may apply by summons to one of the registrars for an order for that purpose."

Reply and subsequent Pleadings.

Altering or amending a pleading.

[*This is subject to an appeal to a judge. See rule 184, ante, p. 284.*]

By rule 35, "When a petition, answer, or other pleading has been ordered to be altered or amended, the time for filing and delivering a copy of the next pleading shall be reckoned from the time of the order having been complied with."

Time for filing amended pleading.

And by rule 36, "A copy of every pleading showing the alterations and amendments made therein shall be delivered to the opposite parties on the day such alterations and amendments are made in the pleadings filed in the registry; and the opposite parties, if they have already pleaded in answer thereto, shall be at liberty to amend such answer within four days, or such further time as may be allowed for the purpose."

Service of amended pleading.

The effect of failing to amend or altering a pleading within the time specified in the order for amendment, or of neglecting to deliver a copy as required by the above rule, is the same as in the case of filing or serving an answer (rule 37), as to which, see *ante*, p. 356.

Effect of failing to alter or amend, or to deliver amended pleading in time.

[*The practice as to amendment of answer and all subsequent pleadings is the same as in the case of "amendment of petition," ante, pp. 328—336.*]

By rule 38, "Applications for further particulars of matters pleaded are to be made to the Judge Ordinary, or to one of the registrars in his absence, by summons, and not by motion."

PARTICULARS.

[*Now to the registrar in the first instance. See rules 181—184, ante, p. 284.*]

Particulars.

Particulars,
in what cases
applied for.

The application for particulars alluded to in rule 38 is supposed only to be made or granted in cases where the charges set forth in the petition or answer are not sufficiently specific, so as to enable the party accused to meet or reply to them.

In practice, however, no matter how carefully the pleadings are drawn, a summons for particulars is taken out in nearly every contested case. It is therefore a very open question if it is not often wiser to plead in as general terms as possible, whether a case is likely to be defended or not.

(See *Form 4 and observations thereon*, ante, p. 295.)

Pleading in
general terms
may occasion-
ally be of
great prac-
tical utility.

In a case that occupied the attention of the Court for some weeks in 1894, a wife was about to file a petition for judicial separation on the ground of cruelty. Quite by accident her solicitor discovered that her husband was about to petition for a divorce. The solicitor immediately filed a petition for judicial separation, charging all the acts of cruelty in one paragraph in general terms, as in *Form 4*. He was thus enabled to get on to the file first, and when the husband's petition was brought into the Registry, which happened within half an hour, it had to be treated as a cross-petition, and the wife's solicitor had the conduct of the case. The particulars in this case were of great length, and an original petition setting out the charges in full would probably not have been filed under several days.

Particulars,
time for
applying for.

If the charges as to which particulars are desired are contained in the original petition, the summons for particulars should be taken out before filing the answer. If they are contained in the answer, then the summons should be taken out before filing reply. Particulars may, however, be applied for at any time.

[Where a petition for dissolution alleged a specific act of adultery on the 25th of August, and other acts of adultery between that day and the 31st of October, an order for

particulars of the *dates* of these latter acts was refused: Particulars.
Boddy v. Boddy and Grover (1858), 28 L. J. P. 16. Where
 a wife charged cruelty which consisted partly in abusive
 language, particulars were ordered of the names of the
 servants who had heard the abusive language used: *Bishop*
v. Bishop, (1901) P. 325; 70 L. J. P. 93; 85 L. T. 173. The
 best particulars it is possible to get from the witnesses must
 be given. It is not sufficient to allege generally that the
 respondent and co-respondent were constantly meeting in
 the respondent's boudoir and bedroom, and that they were
 frequently out driving alone together: *Hartopp v. Hartopp*
and Cowley (1902), 71 L. J. P. 78; 87 L. T. 188.]

If frivolous, vexatious or irrelevant charges are made in a petition, the proper course is to take out a summons asking that they may be struck out. Frivolous
and vexatious
charges.

[But charges against a husband of acts of familiarity with women, not amounting to adultery, are not necessarily frivolous, &c., as it is not impossible that, if proved, they might lead the judge to the conclusion that the husband had conduced to his wife's adultery: *Cox v. Cox* (1893), 70 L. T. 200.]

An order for particulars is, more or less, in the following form:—

FORM 43.

[*Title as in Form 32.*]

Upon hearing the solicitors for the petitioner and respondent, I do order that the petitioner within seven days do furnish to the respondent further and better particulars of the times and places when and where the acts of cruelty (*or* adultery) mentioned in paragraphs 5, 6, and 7 (*or as the case may be*) of the petition filed herein, were committed, and that the said petitioner within the same time do file an affidavit and furnish to the respondent a copy thereof, that no further or better particulars can be given from the facts now within the petitioner's knowledge: And that if at any time between the date of the Order for,
form of.

Particulars. particulars (if any) being given by the petitioner under this order and the hearing of this cause, the petitioner shall obtain such further information as will enable her (*or* him) to give particulars of the matters in respect of which she may have previously made affidavit, that she had then no knowledge, she shall forthwith give particulars thereof to the respondent by way of additional particulars, and, if it shall appear at the hearing that the respondent shall have been materially prejudiced thereby, then that the case shall be dealt with by rejection of the evidence or by adjournment of the trial, or otherwise as to the Court shall seem just: And that if any such further particulars be delivered at any time less than ten clear days before the hearing of this cause, the respondent may apply by summons for the postponement of the said hearing: And that the respondent have days further time to file her (*or* his) answer (*or as the case may be*), after the filing and delivery of the said particulars and affidavit.

(Signed) R. P.
(Registrar.)

Dated the 25th day of July, 19 .

FORM 44.

Form of.

Particulars.

(1) FURNISHED PURSUANT TO AN ORDER OF THE COURT.

[*Title as in Form 32.*]

The following are the particulars as to the acts of adultery charged in the 6th paragraph of the petition (*or as the case may be*) in this case, and now furnished pursuant to an order of this Court, dated the day of , 19 .

The petitioner alleges that the adultery mentioned in the 6th paragraph of the said petition (*or as the case may be*) commenced about the months of March or April,

1903, and was committed on many subsequent occasions between the said months and the beginning of the present year, but on what particular days, or at what particular places, or in what particular month or months, the said respondent is unable to set forth. Particulars.

Dated this 16th day of October, 19 .

Yours, &c.,

B. & J., petitioner's solicitors.

(2) AFFIDAVIT VERIFYING PARTICULARS OF ACTS OF
ADULTERY.

[*Title as in Form 32.*]

I, , of , in the county of , the above-
named petitioner, make oath and say:— Affidavits
as to,
form of.

1. I have been informed and verily believe that the acts of adultery referred to in the 6th paragraph of the petition (*or as the case may be*) filed in this cause commenced about the month of March or April, 1903, and were committed on many subsequent occasions between the said months and the beginning of the present year, but on what particular days, or at what particular places, or in what particular month or months, I am unable to state.

(3) AFFIDAVIT THAT NO PARTICULARS AS TO ACTS OF
ADULTERY CAN BE GIVEN.

[*Title as in Form 32.*]

I, , of , in the county of , the above-
named petitioner, make oath and say:—

2. By an order made in the above-mentioned cause, and bearing date the day of last, it was ordered that I should file particulars as to the facts of adultery charged in the 6th paragraph of the petition (*or as the case may be*) filed by me in this cause.

Particulars.

3. I am unable to set forth, further than is contained in the 6th paragraph of the said petition (*or as the case may be*), the times and places of the adultery charged in the said 6th paragraph of my said petition (*or as the case may be*).

Further particulars.

If further particulars are desired, application must be made by summons as before, but orders for further particulars are only made under very special circumstances. When the party ordered to give particulars has filed an affidavit that no better particulars can be given, as in Form 44, *supra*, the Court may order such party to file a further affidavit explaining why no better particulars can be given. (*As to obtaining leave to interrogate a party under the above circumstances, see Discovery and Inspection, tit. "Evidence," post, pp. 631—637.*)

Explanatory affidavit.Interrogatories.Order for particulars not complied with.

If the order for particulars is not complied with, a summons should be taken out to show cause why the charges of which particulars have been ordered to be given should not be struck out.

Fees.

FEES.

	£	s.	d.
Affidavit	0	2	6
Particulars	0	2	6

[*If the affidavit and particulars are included in one document 2s. 6d. only is charged, that being the usual fee for filing a single document.*]

Costs.

As a rule, the costs of summonses for particulars are not allowed.

Allowed on taxation.

In the case mentioned *ante*, p. 362, where the wife's solicitor deliberately charged cruelty in a single paragraph, the husband was allowed his costs of obtaining particulars, and this would probably always be the case under similar circumstances.

If the order is made with costs, probably the following Particulars.
would be allowed on taxation:—

	£	s.	d.
Drawing summons	0	5	0
Attending issuing	0	6	8
Copy and service of summons	0	3	6
Attending hearing of summons	0	6	8
„ for order	0	6	8
Copy and service of order	0	3	6

[*But see further as to costs allowed on taxation, post, pp. 568—603.*]

In cases where there are cross petitions, in order to save a double hearing, the suits are consolidated, and the conduct of the cause is generally given to the first petitioner. Cross petitions.

If in our supposititious cause the respondent had filed a cross petition, as in Form 3 (*ante*, p. 292), instead of claiming relief by answer, as in Form 33, as soon as appearances had been entered in the respective suits, a notice, more or less in the following form, would have been sent to the solicitors for the respective parties, or, if they appeared in person, to the parties themselves.

CONSOLIDATING CAUSES.

No summons is necessary.

Summons unnecessary.

FORM 45.

In the High Court of Justice,
Probate, Divorce and Admiralty Division.
(Divorce.)

Notice to consolidate, form of.

TROWSE *v.* TROWSE AND MARSHLAND.
TROWSE *v.* TROWSE.

Notice.

It having been brought to the notice of the registrars that the petitioners and respondents in the above suits

**Consolidating
Causes.**

now in progress in this Division of the High Court are the same persons:

I have to request that you will attend before the registrars on the instant, at o'clock, to show cause (if any) why the said suits should not be consolidated.

[The registrar then makes the order for consolidation, more or less in the following terms:—]

TROWSE v. TROWSE AND MARSHLAND.**Order to
consolidate.**

Upon hearing the solicitors for all parties, I do order that this suit will be consolidated with the suit of Trowse v. Trowse.

TROWSE v. TROWSE.

Upon hearing the solicitors for both parties, I do order that this suit be consolidated with the suit of Trowse v. Trowse and Marshland, and carried on in the title of—

**Title of
consolidated
cause.****TROWSE v. TROWSE AND MARSHLAND,
and****TROWSE v. TROWSE.****Papers to be
filed and
minutes kept
in new title.**

All papers filed after consolidation should be endorsed with the title named in the order for consolidation, and the minutes kept in the Registry are entered in the combined action.

**HEARING
OR TRIAL.**

It was formerly the practice to apply to the Court on motion for directions how a cause should be tried, but by rule 205 (promulgated July, 1880) "it shall not be necessary in any case to apply to the Court by motion for directions as to the mode of hearing or trial of a cause. When the pleadings are concluded the parties to a cause may proceed in all respects as though upon the day of

filing the last pleading a special direction had been given by the Court as to the mode of hearing or trial to the effect following:—

Hearing or Trial.
Mode of trial.

1. In cases in which damages are not claimed that the cause be heard by oral evidence before the Court itself without a jury.
2. In cases in which damages are claimed that the cause be tried before the Court, with a common jury.

And any party to a cause may apply by summons for a direction that the cause may be heard or tried otherwise than is hereby provided.”

[See post, *tit. “Practice as to Motions and Summonses,”* p. 511.]

And by rule 206, “Before a cause is set down for hearing or trial the pleadings and proceedings in the cause shall be referred to one of the registrars, who shall certify that the same are correct and in order, and the registrar to whom the same are referred shall cause any irregularity in such pleadings or proceedings to be corrected, or refer any question arising therefrom to the Court for its direction; any party to the cause objecting to such direction of the registrar may (subject to any order as to costs) apply to the Court on summons to rescind or vary the same.”

Registrar's
certificate
that plead-
ings are in
order.

[See post, *tit. “Practice as to Motions and Summonses,”* p. 511.]

When the pleadings are complete and the parties are at issue, the petitioner should fill up the form of application for the registrar's certificate and leave it, with the certificate of marriage, at the Divorce Registry. This application will be forwarded to the registrar, who, if the pleadings are in order, will sign his certificate. After the lapse of three or four days this certificate can be called for and, if obtained, the cause can be set down.

Application
for.

Hearing or Trial.

Registrar's certificate, form of application for.

Application for registrar's certificate where no appearance entered.

Ibid. where appearance entered, but no answer filed.

Undefended cause.

Difference between position of parties who have entered no appearance at all and those who have entered an appearance but filed no answer.

Where answer filed to petition for alimony *pendente lite*, but no answer to original petition.

Where answer consists of

The form of application for the registrar's certificate can be obtained at the registry free of charge, room No. 43. No fee is charged on leaving this application, neither will the costs of settling it be allowed on taxation.

If no appearance has been entered, this application can be left as soon as the time for entering an appearance has expired. The petitioner's solicitor (or the petitioner himself if "*in person*") must file an affidavit of "*Service of Citation*" (see Form 15, ante, p. 307), with citation annexed, also an affidavit of search for appearance, as in Form 46, *infra*.

If an appearance has been entered, but no answer has been filed, the application can be made on filing an affidavit of search for answer, as in Form 47, p. 372.

In both the above cases the cause is heard as undefended, though whereas parties who have not entered an appearance cannot be heard on any part of the case, parties who have entered an appearance, but have filed no answer, are in a somewhat better position.

For by rule 50, "Either of the respondents in the cause, after entering an appearance, without filing an answer to the petition in the principal cause, may be heard in respect of any question as to costs, and a respondent, who is husband or wife of the petitioner, may be heard also in respect to any question as to custody of children, but a respondent who may be so heard is not at liberty to bring in affidavits touching matters in issue in the principal cause, and no such affidavits can be read or made use of as evidence in the cause." (See also ante, p. 341.)

If an answer to a petition for alimony *pendente lite* (as to which see post, tit. "*Practice as to Alimony and Maintenance*," p. 446) has been filed by a husband respondent, he has the right to be heard on that petition only, but not any other part of the case.

If the answer filed merely denies the charges in the petition, issue is considered to be already joined (see ante,

p. 357), and the petitioner can proceed at once to leave his application for the registrar's certificate.

Hearing or Trial.

But if the answer contain countercharges (*whether relief other than the dismissal of the petition is claimed or not*), the application cannot be left until issue is joined; in other words, until the pleadings are complete.

simple traverse only. *Ibid.* where counter-charges are made.

FORM 46.

Affidavit of Search for Appearance.

Affidavit of search for appearance, form of.

TROWSE (Timothy)

v.

TROWSE (Charlotte) and

MARSHLAND (Robert).

Or,

Between Timothy TROWSE, petitioner,
Charlotte TROWSE, respondent, and
Robert MARSHLAND, co-respondent.

I, Robert Charles Brown (*or* "I, A. B., clerk to R. C. B."), of 25, Coleman Street, E.C., in the City of London, solicitor for the petitioner in the above cause, make oath and say that I did, on the day of , one thousand nine hundred and five, search the book kept in the Divorce Registry of the High Court of Justice for entering appearances by or on behalf of parties cited, to ascertain whether or not any appearance has been entered by or on behalf of Charlotte Trowse, the respondent, or Robert Marshland, the co-respondent, in this cause, and that I find no appearance has been entered by or on behalf of the said Charlotte Trowse or Robert Marshland, or by or on behalf of either of them.

Sworn, &c.

(Signed) R. C. B.

or

A. B.

Hearing or
Trial.

FORM 47.

Affidavit of
search for
answer,
form of.

Affidavit of Search for Answer.

[*Commencement as in Form 46.*]

I, Robert Charles Brown, (or "I, A. B., clerk to R. C. B."), of 25, Coleman Street, in the City of London, solicitor for the petitioner in the above cause, make oath and say, that I did on the day of , one thousand nine hundred and five, search the Court minutes at the Divorce Registry of the High Court of Justice to ascertain whether or not any answer had been filed by or on behalf of Charlotte Trowse, the respondent, or Robert Marshland, the co-respondent in this cause, and that I find no answer has been filed by them or on their behalf, or by or on behalf of either of them.

Sworn at, &c.

(Signed) R. C. B.
 or
 A. B.

[*If the respondent, being a husband, has filed an answer to his wife's petition for alimony pendente lite, the affidavit of search for answer should conclude thus:—*

"I find no answer, excepting an answer to the petition for alimony herein, has been filed by him, or on his behalf."]

FORM 48.

Affidavit of Search for Reply.

[*Commencement as in Form 46.*]

Affidavit of
search for
reply,
form of.

I, R. B., clerk to William White, of 66, Frederick's Place, Old Jewry, solicitor for the respondent (*follow the above form down to the words "High Court of Justice," inclusive*), to ascertain whether or not any reply had been filed by or on behalf of Timothy Trowse, the petitioner

in this cause, and that I find no reply has been filed by him, or on his behalf. Hearing or
Trial.

Sworn at, &c.

(Signed) R. B.

It must be borne in mind that by rule 123, "The time fixed by these rules and regulations for the performance of any act, or for any proceeding in a cause, shall in all cases be exclusive of Sundays, Christmas Day, and Good Friday. Therefore, every one of these days must be allowed for, before searching for appearance or answer. Time for
searching.

The day of service is included in the time allowed for entering an appearance. Therefore, supposing the time specified in the citation for appearance is eight days, the search may be made on the ninth day after service, exclusive of Sundays, Christmas Day and Good Friday. Appearance,
time for
search for.

On the other hand, the day of service is excluded from the time allowed for filing answer; therefore the search should not be made until the twenty-third day after service, exclusive of Sundays, Christmas Day and Good Friday. Answer.
Ibid.

The application for the registrar's certificate is in the following form, which can be obtained in the Divorce Registry free of charge. Registrar's
certificate.

FORM 49.

[*Title as in Form 32.*]

The petitioner hereby applies for the certificate of the registrar that the proceedings in the cause are correct, and the pleadings in order. Form of.

The cause is undefended.

The issues to be tried by a jury; the damages to be assessed by a jury.

Dated day of 19 .

Solicitor for the petitioner.

Hearing or
Trial.

Certificate of
marriage
necessary to
be filed with
papers.

Before the registrar's certificate can be obtained that the pleadings are in order, it is necessary to obtain a copy of the marriage certificate of the parties, which together with the registrar's certificate is filed in the Registry with the other papers in the cause.

As soon as the registrar's certificate has been obtained, the cause can be set down for hearing or trial.

Hearing.

In the Divorce Division, when a cause is tried before a judge sitting alone without a jury, it is termed a "HEARING."

Trial.

When, on the other hand, a cause is tried by a judge sitting with a jury, it is termed a "TRIAL."

Notice to
opposite party
where case
tried by jury.

By rule 44, "In cases to be tried by a jury, the petitioner, after the expiration of eight days from the delivery of copies of the questions for the jury to the opposite parties, or from alteration or amendment of the same . . . shall file such questions as finally settled in the registry, and at the same time set down the cause as ready for trial, and on the same day give notice of his having done so to each party for whom an appearance has been entered."

[*As to questions for jury, see post, pp. 379—381.*]

Ibid. where
case heard
before Court
itself.

By rule 45, "In cases to be heard without a jury, the petitioner shall, after *obtaining the registrar's certificate*, set the cause down for hearing, and on the same day give notice of his having done so to each party in the cause for whom an appearance has been entered."

Party who has
appeared, but
filed no
answer,
entitled to
notice.

It will be observed that parties who have entered an appearance, but have filed no answer, are entitled to notice under the above two rules.

Copy of notice
of setting
down for trial
to be filed in
the registry.

And by rule 47, "A copy of every notice of the cause being set down for trial or hearing shall be filed in the registry, and the cause shall come on in its turn, unless the Court shall otherwise direct."

Registrar's
certificate
necessary in

The registrar's certificate is as necessary where suits have been consolidated as in any other case.

When the cause is ripe for trial, fill up the following form of præcipe which can be obtained at the Registry, room No. 43.

Hearing or
Trial.
consolidated
suits.

FORM 50.

Præcipe setting down Cause for Hearing or Trial.

[*Title as in Form 32.*]

Petitioner hereby sets this cause down for hearing before the Court itself (*or as the case may be*).

Defended (*or undefended*).

For dissolution of marriage.

Dated the day of 19 .

Præcipe
setting down
cause for
hearing or
trial,
form of.

Solicitor for the petitioner.

By rule 113, all notices required by the rules or by the practice of the Court must be in writing, and signed by the party or his or her solicitor.

Notices.

The notice required by rules 44 and 45 (*supra*) to be given to the opposite parties should be more or less in the following form:—

Suggested
form of.

FORM 51.

Notice of having set down Cause for Hearing or Trial.

[*Title as in Form 32.*]

Cause No. .

Take notice that this cause was this day set down for hearing or trial before the Court itself (*or as the case may be*).

Dated the day of , 19 .

Solicitor for the petitioner.

To ,

Solicitor for the .

Notice of
hearing or
trial.

[But it has been held by the Court of Appeal that a letter to the solicitor for the opposite party, telling him that the cause has been set down, is a sufficient notice of trial,

But any form
sufficiently
clear is
sufficient.

Hearing or Trial. although no formal notice may have been given, as in Form 51: *Fluister v. Fluister and Hulton*, (1897) P. 22; 66 L. J. P. 33.]

Forms to be left at the registry. If the case is defended, both the above forms must be left at the Divorce Registry (room No. 38) with the fees. In undefended cases the *præcipe* (No. 50) only need be left.

Pleadings amended subsequent to certificate. If the pleadings have been amended subsequent to the date of the registrar's certificate, they must be submitted to the registrar again.

Fees.

FEEES.

Setting down for hearing.	£	s.	d.
Setting down cause	2	0	0
Drawing decree	1	0	0
Filing any document	0	2	6

[See also post, pp. 568—603.]

Consolidated causes. In consolidated causes a further fee of 5s. is paid for each order. Where cases have been consolidated, the solicitor to either party need not make out two separate bills. That is to say, although the wife is "petitioner" in one cause and respondent in the other, her solicitor need not make out a bill of costs against her in each character. It will be sufficient for him to make out one bill, describing her all through as "*the wife*." And the same with respect to the solicitor for "*the husband*."

Bill of costs, how made out.

Respondent may set down cause for hearing, if petitioner fails to do so. By rule 46, "If the petitioner fail to file the questions for the jury or set down the cause for trial or hearing, or to give due notice thereof for the space of one month, after the pleadings are complete, either of the respondents entitled to be heard at such trial or hearing may file the questions for the jury, and set the cause down for trial or hearing, and shall on the same day give notice of his having done so to the petitioner, and to each of the other parties to the cause for whom an appearance has been entered."

"One month after the pleadings are complete," must be understood to mean "*one month after the date of the certificate.*"

The majority of causes are heard before the Court itself. But where the petition contains a claim for damages, the cause must be tried by a jury, the Court being prohibited from itself assessing damages by sect. 33 of the Matrimonial Causes Act, 1857; and this rule applies to "undefended" as well as to defended cases. (*See rule 205, ante, p. 368.*)

Unless a special jury is desired, a case in which damages are claimed is heard before a judge sitting with a common jury.

If a special jury is desired, it must be obtained by summons. (*See post, tit. "Practice as to Motions and Summonses," p. 511.*)

Where there is no claim for damages in a petition, the usual practice is for the cause to be heard before the Court itself; that is, by a judge sitting alone without a jury. (*See rule 205, ante, p. 368.*)

But either party to a suit may in every case, whether damages are claimed or not, apply by summons (*see post, tit. "Practice as to Motions and Summonses," p. 511*) for an order that the case may be tried by a jury.

By rule 41, "Whenever the issues of fact in a cause are to be tried by a jury, the questions of fact raised by the pleadings are to be briefly stated in writing by the petitioner and settled by one of the registrars."

If an order for a jury is obtained by the respondent or the co-respondent, the questions for the jury will nevertheless be brought in by the petitioner.

No questions for the jury are required in undefended causes, as there is no issue to try, and the jury is only required for the purpose of assessing damages.

Where an undefended cause is to be tried by a jury, the application for the registrar's certificate, præcipe, and notice of setting down cause are left in the registry in

Hearing or Trial.

"One month after pleadings complete," meaning of. Cause, how heard. When damages claimed must be tried by jury.

Common jury.

Special jury must be obtained by summons.

No damages claimed. Cause heard before Court itself.

Application for trial by a jury where no damages claimed must be by summons.

Questions of fact for jury.

Questions for jury brought in by petitioner.

Not required in undefended cause.

Undefended cause to be tried by jury; practice as to setting down.

Hearing or Trial.

Petitioner failing to prepare questions, respondent or co-respondent may do so.

Defended cause to be tried by jury. Settling questions in registry.

Copy of questions to be delivered to parties entitled to be heard.

How served.

Setting down cause for trial after settling questions, where no objection raised.

Ibid. Where questions objected to.

Resettling questions.

Fees. Special jury.

Ibid. common jury.

the same manner, and the same fees are paid, as in the case of an undefended cause tried before the Court itself.

By rule 42, "Should the petitioner fail to prepare and deposit the questions for settlement in the registry within fourteen days after the pleadings are complete (*see rule* 205, ante, *p.* 368), either of the respondents on whose behalf such questions have been raised shall be at liberty to do so."

Where a defended cause is to be tried by a jury, the party applying for the registrar's certificate leaves at the Divorce Registry (room No. 38), together with his application, the questions for the jury in draft to be settled by the registrar, and he should inquire when to call for them.

A fee of 10s. is charged for settling.

By rule 43, "After the questions have been settled by the registrar, the party who has deposited the same shall deliver a copy thereof as settled to each of the other parties to be heard on the trial of the cause."

This does not include a party who has appeared but has filed no answer.

A plain copy is delivered to the solicitors for the parties, or left at the address for service, if they appear in person.

If no objection be taken by the other side within eight days after such copy has been served as above, the petitioner can file at the Divorce Registry (room No. 38) the draft questions as settled, together with a copy engrossed on paper (*parchment is no longer necessary*), and set the cause down.

If any objection is raised by the other side the questions have to be considered and finally settled by the registrar, for which purpose an appointment must be obtained.

A further fee of 10s. is charged if the questions have to be resettled in consequence of any amendment in the pleadings.

A special jury costs thirteen guineas, each of the jurymen and the sheriff being entitled to a fee of one guinea.

On the other hand, a common jury costs one pound two

shillings and sixpence, the fee for each juryman being one shilling only, and ten shillings and sixpence for the sheriff.

Hearing or Trial.

Where a jury is discharged without giving a verdict they are entitled to no fees, unless the parties consent. The sheriff's fee is payable in any case.

Jury discharged without verdict.

FORM 52.

Questions of Fact for the Jury.

Questions for jury, form of.

[*Title as in Form 32.*]

[*In our supposititious case damages are claimed against Robert Marshland (Form 5, ante, p. 295). If the respondent had filed no answer, and the co-respondent had simply traversed the charges (or vice versâ), there would in either case be but two questions:*]

Respondent filing no answer; co-respondent merely traversing the charge of adultery or vice versâ.

1. "Whether the co-respondent, Robert Marshland, has committed adultery with Charlotte Trowse, the respondent;"

or,

"Whether the respondent, Charlotte Trowse, has committed adultery with Robert Marshland, the co-respondent."

2. What amount of damages (if any) should be paid by the co-respondent, Robert Marshland, in respect of the adultery (if any) by him committed with Charlotte Trowse, the respondent.

[*If both respondent and co-respondent had answered, simply traversing the charges of adultery, the questions would then be:*]

Respondent and co-respondent pleading simple traverse.

1. Whether Charlotte Trowse, the respondent, has committed adultery with Robert Marshland, the co-respondent.
2. Whether Robert Marshland, the co-respondent, has

Hearing or
Trial.

committed adultery with Charlotte Trowse, the respondent.

3. What amount of damages, &c. (*as above*).

Two co-
respondents,
both pleading
simple
traverse.

[*If in our supposititious case a supplemental petition (Form 28, ante, p. 332) had been filed, there would then be a second co-respondent, Benjamin Buckenham; and if damages had been claimed against him as well as against Robert Marshland (see Form 5, ante, p. 295), and both co-respondents had answered simply traversing the charges, the questions would then be :—*]

Where
counter-
charges
made.

1. Whether the respondent, Charlotte Trowse, has committed adultery with the co-respondent, Robert Marshland.
2. Whether the co-respondent, Robert Marshland, has committed adultery with Charlotte Trowse, the respondent.
3. Whether the respondent, Charlotte Trowse, has committed adultery with the co-respondent, Benjamin Buckenham.
4. Whether the co-respondent, Benjamin Buckenham, has committed adultery with Charlotte Trowse, the respondent.
5. What amount of damages, &c. (*as above*).
6. What amount of damages (*continue in the same words as paragraph 5, substituting "Benjamin Buckenham" for "Robert Marshland"*).

[*Where countercharges are made, as in Forms 33, 34, and 35, ante, pp. 344—350, some or all of the following questions will be also necessary :—*]

1. Whether Timothy Trowse, the petitioner, has committed adultery.

- | | |
|---|--------------------------------|
| <p>2. Whether Timothy Trowse, the petitioner, has been guilty of cruelty towards the respondent, Charlotte Trowse.</p> <p>3. Whether Timothy Trowse, the petitioner, has condoned the adultery (if any) committed by the respondent, Charlotte Trowse, with the co-respondent, Robert Marshland (or "Benjamin Buckenham," or as the case may be).</p> <p>4. Whether Timothy Trowse, the petitioner, has connived at the adultery (if any) (&c., as in Question 3).</p> <p>5. Whether the petitioner, Timothy Trowse, and the respondent, Charlotte Trowse, are acting in collusion.</p> | <p>Hearing or Trial.</p> <hr/> |
|---|--------------------------------|

[Other questions can easily be framed from the above to meet any other countercharges.]

<p><i>[If charges of adultery had been made against Charlotte Trowse with persons other than those made co-respondents, the question would then be:]</i></p>	<p>Charge of adultery with persons other than co-respondents.</p>
--	---

"Whether the respondent, Charlotte Trowse, has committed adultery with persons other than Robert Marshland and Benjamin Buckenham, the co-respondents."

<p>The following costs will probably be allowed on taxation:—</p>	<p>Costs allowed on taxation.</p>
---	-----------------------------------

<i>Petitioner's Solicitor.</i>	£ s. d.	<i>Petitioner's solicitor.</i>
Attending at Somerset House, searching and arranging for copy of marriage certificate	0 6 8	

[This is not done in the Divorce Registry, but in the Registrar-General's Department. Door on the left hand under the arch, immediately on

**Hearing or
Trial.**

leaving the Strand. Hours, 10 to 4. Fees payable: Search, 1s.; copy, 2s. 6d.; and stamp, 1d.]

	£	s.	d.
Attending applying for registrar's certificate	0	6	8
Attending setting cause down	0	6	8
Notice to respondent (<i>or co-respondent, or both, or as the case may be, for each notice</i>) copy and service	0	4	0
Copy	0	1	0
Drawing questions for jury	0	10	0
Attending leaving same for settlement	0	6	8
Attending for questions after settlement	0	6	8
Copy and service on solicitor for respondent (<i>or as the case may be</i>)	0	6	8
Drawing notices to produce and admit, or to inspect, per folio	0	1	0
Copy and service	0	4	6

**Solicitor to
opposite
party.**

*Respondent, Co-respondent, or
Intervener's Solicitor.*

Perusing questions	0	1	0
Approving and returning same	0	6	8
Perusing notice to produce and admit	0	6	8
Perusing notice to inspect	0	6	8

*[And, of course, all fees paid out of pocket,
see post, pp. 568—603.]*

**Dismissing
petition for
want of
prosecution.**

If the petitioner does not prosecute the proceedings with due diligence, either the respondent or the co-respondent can apply for the petition to be dismissed, for want of prosecution; or the petitioner may apply himself to have it dismissed.

[An application to dismiss a petition for dissolution, whether by consent or not, must now be made by summons before a registrar, and not by motion in open Court: Slater v. Slater and Bolderson (1900), 69 L. J. P. 48.]

All the pleadings, however, up to the point at which the petition was dismissed, remain filed in the Divorce Registry and are not given out.

Hearing or Trial.

Petition dismissed.

When a petition has been dismissed as above, the registrar will make such order as to costs as may be right.

Pleadings remain filed.

[*There is an appeal from the registrar to the judge in chambers. See post, tit. "Practice as to Motions and Summonses," p. 511; "Practice as to Costs," p. 540.*]

By rule 193, "When an order has been made for the dismissal of a petition on payment of costs, the cause will not be removed from the list of causes in the Court books without an order of one of the registrars, to obtain which it must be shown to his satisfaction that the costs have been paid."

Where dismissed on payment of costs, costs must be paid before cause can be removed from list.

[Where a petition so dismissed still remained on the reserved list, the Court refused to pronounce a decree on a subsequent petition filed by the same petitioner: *Onslow v. Onslow, Jones and Campbell* (1889), 60 L. T. 680.]

Rule 48 provides, "That no cause is to be called on for trial or hearing until after ten days from the setting down and notice thereof, save with the consent of all parties."

Ten days to intervene before cause is tried.

A list of causes set down is printed ten days before the commencement of each sitting, and copies can be obtained at the Royal Courts.

Cause list.

The cause list is finally closed ten days before the sitting of the Court, and no case can be afterwards inserted therein, except by leave of a judge, which can be applied for in open Court. These applications are *ex parte* and are not necessarily made on the regular motion days (*as to which, see post, tit. "Practice as to Motions and Summonses," p. 511*). They are frequently made at the sitting of the Court, immediately before or immediately after the adjournment for luncheon, or when the Court rises for the

Case omitted from printed list.

Hearing or
Trial.

day. The application usually is that the case may be placed at the bottom of the list.

Title of cause
must be
correct.

[The Court will not allow cases to be proceeded with, either where the names of the parties are improperly omitted from the title of the cause (*Onslow v. Onslow, Jones and Campbell* (1889), 60 L. T. 680); or where the names of the parties are improperly retained in such title after they have been formally dismissed from the proceedings: *Connemara v. Connemara*, (1892) P. 102; 61 L. J. P. 96; 66 L. T. 592.]

Solicitors
should see
this is so.

It is therefore the duty of the petitioner's solicitor to see that the cause is correctly described, both in the official term list and in the daily cause list.

[In an undefended case, where the names of the co-respondents were omitted, the Court refused to allow the case to be proceeded with on the day on which it came on for hearing, but allowed it to be put into the list for next day, properly described: *Onslow v. Onslow, Jones and Campbell* (1889), 60 L. T. 680.]

Term list.

Besides the official list published as above, ten days before the sittings of the Court, called the "term list," a list is printed every day, called the "daily list," showing the cases to be taken the next day, and published by being posted outside the Royal Courts, at Somerset House, in the Temple, and at other places.

Daily list.

The daily list is not published until the afternoon, and no notice of its contents is sent to any of the parties.

Solicitors
should watch
lists day by
day.

It is therefore absolutely necessary for solicitors to watch the lists, day by day, to ascertain when their cases are coming on. This is doubly necessary whenever there is a chance of two Courts sitting to hear matrimonial causes at the same time, which very frequently happens when undefended cases are being taken, especially at the beginning of a term.

Cause
called on;
parties failing
to appear.

Every cause is called on in its proper turn according to the official lists, and if, when so called, the parties do not appear, the judge orders the cause to be struck out; unless,

as not infrequently happens, one of the counsel in the case gives some satisfactory explanation to the Court, in which case it is usually allowed to stand over for a reasonable time.

Hearing or
Trial.

When a cause is once struck out, it can only be restored to the list on an application made by counsel in open Court, which, unless made with the consent of all parties, must be supported by an affidavit.

Cause
struck out:
reinstatement.

[This application may be made at any time in the same way as an application to insert a cause in the list, ante, p. 383.]

Besides the above-mentioned two lists of causes, there are also a reserved list, containing cases standing over by order of the Court, or by consent, and a list of "Part Heard" causes.

Lists of causes
standing over
and part
heard.

If it is desired to place a cause in the reserved list, application must be made to the Court by motion or summons. It is frequently, generally when all parties consent, made in the same way as in the case of an application to reinstate a cause after striking out (*supra*).

Placing case
on reserved
list.

A case can be removed from the reserved list and replaced in the list of causes for trial, by the petitioner's solicitor giving ten days' notice to the other parties, which should be headed in the cause, and be more or less in the following form, though any form of notice which is clear and definite, and is correctly dated, will suffice:—

Removing
case from
reserved list.

FORM 53.

"Take notice that I have this day removed the above cause from the reserved list of causes standing over, and have replaced it in the list of causes for hearing.

Notice,
form of.

"July 29th, 19 .

"B. & J.,
"Solicitors for Petitioner."

Hearing or Trial.	A copy of this notice must be filed in the Divorce Registry, and the usual fee for filing all documents, 2s. 6d., paid.
Copy to be filed in Divorce Registry.	When it is desired to proceed with a part-heard cause, notice must be given to the clerk of the rules, at the Court, that the parties are ready to proceed. The cause will then be placed in the list for hearing on the first day appointed by the Court for hearing similar causes, unless some other case has been specially fixed to be taken on that day.
Part-heard cause, further hearing.	If all the parties defending desire to withdraw their defence in a cause already in the defended list, a summons should be taken out before the judge in chambers for leave to withdraw the answer. If the order is made, the cause will then be transferred to the undefended list.
Removing cause from defended to undefended list.	An application to transfer a cause from the list of undefended to the list of defended causes must also be made by summons before the judge in chambers.
<i>Ibid.</i> undefended to defended list.	The same rule applies to an application that a case may be tried by a jury when it has been entered for hearing before the Court itself.
Altering mode of trial.	When it is desired to dispense with a jury by consent, the usual course is simply to ask the judge, when the case is called on, to dismiss the jury.
Dispensing with jury by consent.	A cause entered in the list may, with the consent of all parties, be marked "Postponed till next sittings." This is done by leaving with the clerk of the rules, at the Court, a notice to that effect, with the consent of all parties indorsed upon it. Otherwise application to postpone the hearing of a cause already in the list must be made by summons in chambers or motion.
Postponement of cause already in list.	(<i>Motions to postpone hearing are often, if the circumstances warrant it, for the convenience of counsel heard at irregular times, as in the case of the applications mentioned, ante, pp. 383, 384.</i>)
Stay of proceedings	Applications to stay proceedings on the ground of

non-payment of costs (*see tit. "Practice as to Costs"*) as ordered, or on other grounds, when the cause is already in the printed list (*at all events, unless it is certain not to be reached for a long time, and even that is very doubtful*), will not be dealt with by the registrars.

Hearing or Trial.

when cause already in printed list.

In every such case the application must be made on summons to a judge in chambers.

Application must be to judge in chambers.

A stay of proceedings is removed by giving notice to the clerk of the rules, and also to the registry, and the case is then entered at the bottom of the list, unless otherwise ordered.

Stay, how removed.

Where evidence is ordered to be taken before a commissioner or examiner (*as to which, see tit. "Practice as to Evidence," p. 604*), neither the issue of the commission nor the order for examination operates as a stay of the hearing of the cause, unless such stay is ordered at the time the application for the order for such commission or examination is applied for. If a stay is ordered it is removed on the return of the commission or examination. No notice of this return is required to be given.

Commissions, &c. to take evidence do not operate as stay, unless asked for at time of applying for same.

The Court will not allow causes to remain in the printed list for an indefinite time. Therefore it has for many years been the practice to call over all causes that have been in the reserved and part-heard lists for twelve months on some motion day. (*As to what are "motion days," see tit. "Practice as to Motions and Summonses," p. 511.*)

Causes standing in the reserved and part-heard lists for twelve months.

Before doing so, a notice is sent from the Court to the solicitors, or petitioner suing in person, which should be headed in the cause, and be more or less in the following form:—

Called over on motion day during Michaelmas sittings.

"Take notice that causes in the reserved and part-heard lists, which have been standing over for more than a year, will be called over on the 6th day of November, 19 ."

Notice of calling over.

Hearing or Trial.

If no one appears at calling over, cause struck out.

Hearing or trial.

The causes in the reserved and part-heard lists are called over one by one slowly, and if no one appears to make any application with respect to them they are struck out.

When the cause comes on it is heard to the end, and disposed of either by the decision of the judge or the verdict of the jury, as the case may be.

Decree.

If the petitioner is successful a decree is pronounced, which in the case of "dissolution of marriage" is a decree *nisi*, to be made absolute after six months. (*See post*, p. 487.)

Decree and finding of jury to be entered and signed by the registrar.

Decree *nisi* drawn up by registrars.

By rule 49, "The registrar shall enter in the Court book the finding of the jury and the decree of the Court, and shall sign the same."

The decree *nisi* is drawn up by the registrars.

(*The practice as to drawing up and making absolute decrees, service of same, what documents are retained in the registry after decree, &c., is fully dealt with, tit. "Practice as to Decree and Intervention," p. 487.*)

Hearing suits *in camera*.

[Although it is the almost invariable practice to hear suits for dissolution in open Court, evidence tendered in a suit for dissolution may also be heard *in camera*, when its nature is such that justice cannot be done if it be heard in open Court: *Druce v. Druce*, (1903) P. 144; 72 L. J. P. 51; 88 L. T. 573.]

ABATEMENT OF SUIT.

A suit abates by the death either of the petitioner or the respondent.

Death of petitioner or respondent.

In such case the solicitor for the deceased party should give notice of the fact to the Divorce Registrars, more or less in the following form, though no special form is necessary provided the notice is clear, and unmistakably gives the correct date of the death of such party:—

To face p. 389.

New Rules of the Supreme Court (Poor Persons),
dated April 28th, 1913, are printed on p. 767.

Abatement
of Suit.

FORM 54.

"We hereby give you notice that Timothy Trowse, the
petitioner herein, died on the 25th day of Novem-
ber, 19 , whereby this cause has abated.

Notice to
divorce
registrars.

"Dated November 26th, 19 .

"(Signed) BROWN & JONES,
"225, Coleman Street, E.C.
"Solicitors for the petitioner.

"To the Registrars of the Divorce Registry."

[If a co-respondent dies pending suit, a motion should be made to strike his name out of the proceedings: *Sutton v. Sutton and Peacock* (1863), 32 L. J. P. 156. The Court made a decree absolute notwithstanding affidavits that both respondent and co-respondent were dead when not satisfied on the evidence: *Dering v. Dering and Blakeley* (Queen's Proctor and others intervening) (1868), L. R. 1 P. & D. 531; 19 L. T. 48. See also as to abatement by death: *Grant v. Grant and Bowles and Pattison* (1862), 2 S. & T. 522; 31 L. J. P. 174; *Ling v. Ling and Croker* (1865), 4 S. & T. 99; 34 L. J. P. 52; 13 L. T. 251; *Hall v. Hall* (1864), 3 S. & T. 390; *Brocas v. Brocas* (1861), 2 S. & T. 383; 30 L. J. P. 172; 5 L. T. 137.]

Co-respondent dying
pending suit.

Suits *in formâ pauperis* are regulated by the following rules:—

SUING
IN FORMÂ
PAUPERIS.

By rule 25, "Any person desirous of prosecuting a suit *in formâ pauperis* is to lay a case before counsel, and obtain an opinion that he or she has reasonable grounds for proceeding."

Case for
counsel.

It has been for many years the practice for counsel, if they think fit, to conduct cases for parties suing *in formâ*

Counsel
conducting
cases for.

**Suing
in Forma
Pauperis.**

pauperis, in person, without the intervention of a solicitor; but it is a practice very much to be deprecated, and never to be resorted to, unless justified by the extreme poverty of the client.

**Order of
judge.**

By rule 26, "No person shall be admitted to prosecute a suit *in formâ pauperis* without the order of the judge (*but see rule 208*); and to obtain such order the case laid before counsel and his opinion thereon, with an affidavit of the party or of his or her proctor, solicitor, or attorney, that the said case contains a full and true statement of all the material facts, to the best of his or her knowledge and belief, and an affidavit of the party applying as to his or her income or means of living, and that he or she is not worth 25*l.*, after payment of his or her just debts, save and except his or her wearing apparel, shall be produced at the time such application is made."

**Interpretation
of rule 26 by
Lord Hannen.**

Some years ago the late Lord Hannen held that anyone whose total income did not exceed 1*l.* a week was within this rule, and this amount still holds good, unless varied by a judge for special reasons.

**Application in
formâ pauperis
to be made to
registrar.**

By rule 208, "Applications for leave to prosecute or defend a suit *in formâ pauperis* may hereafter be made to one of the registrars, who will make such order thereon as he may see fit or refer the application to the Court."

Rules 26 and 208 must of course be read together.

**Case for
counsel,
contents of.**

The case for counsel should set out all the facts relied upon by the pauper in simple language, as little technical as possible. It is in no sense a formal document, and the following form is merely a suggestion, not a precedent. All the technical words required, such as "lawfully married," "cohabiting together," &c., &c., must be used in the petition, but are not necessary in the case.

**Husband
applicant.**

The following forms assume that the wife is the applicant, but where the applicant is the husband the proceedings are analogous:—

FORM 55.

Suing
in Forma
Pauperis.

Case for Counsel on behalf of a Pauper.

The applicant, Henrietta Horning (then Henrietta Halesworth, spinster), was married to her husband, Harold Horning, on February 10th, 1900, at the parish church of St. Margaret, Lowestoft, in the county of Suffolk.

Suggestion
for case,
wife appli-
cant.

After the marriage the parties lived together first at Lowestoft, for a short time only, and afterwards at Forest Gate, London, up to the month of May, 1903.

There have been two children issue of the marriage—a boy, Henry Horning, born December 24th, 1900, and a girl, Harriett Horning, born July 30th, 1902.

The parties lived happily together for about eighteen months, when the husband took to habits of intemperance, and frequently assaulted, beat his wife severely, gave her black eyes, and kicked her, when he was drunk. On one occasion, just after the birth of her second child, in August, 1902, he showed her a loaded pistol, and threatened to shoot both of them. On one occasion, in the same month, he pulled her out of bed and kicked her several times; and on another occasion, in November of the same year, he turned her out into the street in her nightdress, and she had to take refuge with a neighbour. His language whenever he had been drinking was violent and abusive, often threatening, and generally filthy and obscene.

All this happened whilst the parties were residing at Forest Gate.

In the spring of 1903 he finally left her, and has ever since been living in adultery at East Dereham, in Norfolk, with a woman named Beatrice Bilney.

The applicant cannot remember the exact date at which her husband left her, as she was at the time seriously ill in the infirmary of the Stratford Union, after a miscarriage, the result of a kick given her by her husband; but it was certainly not later than May, 1903.

**Suing
in Forma
Pauperis.**

The date of her admission to the infirmary can be easily ascertained.

Since her husband left her she has resided with her two children at 537, East Street, Walworth, and has entirely supported herself and them by going out as a charwoman. Her husband sent her 2*l.* whilst she was in the infirmary in May, 1903; since which time she has received no assistance from him whatever.

Counsel will please advise whether the applicant has sufficient grounds on which to petition for a dissolution of her marriage.

Opinion.

Opinion.

I am of opinion that the applicant has a good case on which to petition for a dissolution of her marriage.

A. B.

5, Court,
Temple.

July 30th, 19 .

The case and opinion of counsel should be endorsed thus:—

FORM 56.

**Case for
counsel.
Form of
indorsement.**

In the High Court of Justice,
Probate, Divorce and Admiralty Division.
(Divorce.)

In the matter of the application of Henrietta Horning
for leave to petition *in formâ pauperis* for a
dissolution of her marriage.

Case and Opinion of Counsel.

Brown & Jones,
225, Coleman Street, E.C.,
Petitioner's Solicitors.

Or,

In person

[*and address within three miles of the General
Post Office*].

The petition and all subsequent pleadings in pauper causes should have the words "*in formâ pauperis*" written on some part of the indorsement.

**Suing
in Formâ
Pauperis.**

By rule 209, "The affidavit required by rule 26, if application is made by a wife to prosecute a suit against her husband *in formâ pauperis*, shall state to the best of her knowledge and belief the amount of income or means of living of her husband."

"*In formâ pauperis*" should be written on indorsement of petition and all subsequent pleadings.
Wife petitioner.

FORM 57.

Affidavit required by Rule 26.

In the High Court of Justice,
Probate, Divorce and Admiralty Division.
(Divorce.)

Affidavit as to means; wife applicant; form of.

In the matter of the application of Henrietta Horning
for leave to petition *in formâ pauperis* for a
dissolution of her marriage.

I, Henrietta Horning, of 537, East Street, Walworth, in the county of London (the lawful wife of Henry Horning), make oath and say as follows:—

1. That I am the applicant mentioned in the case and opinion of counsel hereunto annexed, and marked A. (*the case is marked by the commissioner before whom the affidavit is sworn*), which contains a full and true statement of the principal acts of cruelty and of the desertion, and also a true statement (to the best of my knowledge, information and belief) of the acts of adultery upon which I rely to obtain a dissolution of my marriage.
2. That I have no means of support, save and except my occupation as a charwoman, by which I have earned, since my desertion by my husband, as set forth in the said case, an average of 10s. a week,

**Suing
in Forma
Pauperis.**

together with a certain amount of food, which I value at 5s. a week.

3. That otherwise I am entirely without means, and am not worth twenty-five pounds after payment of all my just debts, save and except my wearing apparel.
4. That I know of my own knowledge that the said Henry Horning has no means whatever, and I am informed and verily believe that he is out of employment, and that he is now, and has for some time past been, living on the earnings of Beatrice Bilney, the woman with whom (as alleged in my said case) he is now living in adultery.

Sworn, &c.

(Signed) HENRIETTA HORNING.

Husband
petitioner,
wife
defending
*in formâ
pauperis.*

By rule 210, "When a husband has been admitted to prosecute a suit against his wife *in formâ pauperis*, the wife may apply for an order that she be at liberty to proceed with her defence *in formâ pauperis* on production of an affidavit that she has no separate property exceeding 25*l.* in value after payment of her just debts."

Summons
necessary.
Wife
petitioner,
husband
defending
*in formâ
pauperis.*
Affidavit
necessary.

This application must be made by summons.

By rule 211, "When a wife has been permitted to prosecute a suit against her husband *in formâ pauperis*, the husband may apply for leave to proceed with his defence *in formâ pauperis* on production of an affidavit as to his income or means of living, and showing that besides his wearing apparel he is not worth 25*l.* after payment of his just debts."

This application must be made by summons.

Affidavit of
husband,
contents of.

Where an affidavit, as in Form 57, is made by a husband either as petitioner or respondent *in formâ pauperis*, he is not required to say anything as to his wife's means.

Case and
affidavit to
be left at

The case and affidavit are left at the Divorce Registry, when the applicant should inquire when to call and fetch

them. If approved by the registrar the order will be made, and the petitioner may proceed *in formâ pauperis*.

Suing
in Forma
Pauperis.

The subsequent proceedings are conducted as in an ordinary case for dissolution of marriage, except that no fees are charged.

Divorce
Registry.
Registrar's
order, how
obtained.
Subsequent
proceedings,
how
conducted.
Suit com-
menced in
ordinary way,
petitioner
desiring to
continue
*in formâ
pauperis*.

Where a suit for dissolution has been commenced in the ordinary way, and the petitioner desires to continue the proceedings *in formâ pauperis*, he or she must apply for leave to do so by summons, which must be served on all the parties who have appeared.

Where a suit for dissolution has been commenced in the ordinary way, either the respondent or co-respondent may apply for leave to defend the suit *in formâ pauperis*.

Ibid. respon-
dent or co-
respondent
desiring to
defend
*in formâ
pauperis*.

The practice in such a case is the same as on an application to sue *in formâ pauperis*.

Counsel and solicitors are not assigned to paupers in the Divorce Court.

Counsel and
solicitors not
assigned by
Court.
Dispauper-
ing.

Where an order to sue or proceed *in formâ pauperis* has been obtained by fraud or misrepresentation, the party obtaining such order will be dispaupered. Proceed by summons.

[With respect to costs in pauper causes, see ante, p. 245, and post, pp. 568—603.] Costs.

This is a convenient and summary mode of proceeding, often resorted to for the adjudication of any incidental subject which may arise during or after the progress of a suit. For instance, the question of jurisdiction is often determined by an appearance under protest, and an act on petition filed thereon.

ACT ON PETITION.

What is.

By rule 22, "If a party cited wishes to raise any question as to the jurisdiction of the Court, he or she must enter an appearance under protest, and within eight days

Appearance
under protest.

Where a party has appeared under protest as above, he or she should, within eight days therefrom, file his or her act on petition (*to be signed by such party or his or her solicitor*), and on the same day deliver a copy to the petitioner or his or her solicitor.

Act on
Petition.

Party
appearing
under protest.

Act on
petition, when
to be filed.

The petitioner must file his or her answer within eight days from the day of the delivery of the act, and all subsequent pleadings must be delivered within eight days from the day of the service of the last pleading.

Ibid. answer
and subse-
quent
pleadings.

Where no appearance under protest as above has been entered, but merely an ordinary appearance, then by rule 56, "Any party to a cause who has entered an appearance may apply on summons (*to one of the registrars*), to be heard on his petition touching any collateral question which may arise in a suit."

Party not
appearing
under protest.

Summons for
leave to file
act on
petition.

By rule 57, "The party to whom leave has been given to be heard on his petition shall within eight days file his act on petition in the registry, and on the same day deliver a copy thereof to such parties in the cause as are required to answer thereto."

Time for
filing after
leave
obtained.

And by rule 58, "Each party to whom a copy of an act on petition is delivered shall within eight days after receiving the same file his or her answer thereto in the registry, and on the same day deliver a copy thereof to the opposite party, and the same course shall be pursued with respect to the reply, rejoinder, &c., until the act on petition is concluded."

Ibid.
answer and
subsequent
pleadings.

[Of the following two forms, Form 59 is official, and Form 60 derived from the pleadings in a case which was heard some years ago.]

Act on
Petition.

FORM 59.

Act on
petition,
form of.

Act on Petition.

In the High Court of Justice,
Probate, Divorce and Admiralty Division.
(Divorce.)

A. B.,
 against
C. B., and
R. S.

On the day of 19 .

A. B., the petitioner (or C. D., the solicitor of A. B., the petitioner), alleged that

(Here state briefly the facts and circumstances upon which the petition is founded.)

Wherefore the said A. B. (*or* C. D.), referring to the affidavits and proofs to be by him exhibited in verification of what he so alleged, prayed that

(Here set forth the prayer of the petitioner.)
 (Signed) A. B.
 or
 C. D.

Answer.

Ibid. answer. In the High Court of Justice,
Probate, Divorce and Admiralty Division.
(Divorce.)

A. B.,
 against
C. B., and
R. S.

On the day of 19 .

C. B., the respondent (or G. H., the solicitor of C. B.,

the respondent), in answer to the allegations in the act on
petition, bearing date the day of 19 , of Act on
A. B., admitted (*or* denied) that Petition.

*(Here set forth any allegations admitted or
denied.)*

And he alleged that

*(Here state any facts or circumstances in expla-
nation or in answer.)*

Wherefore the said C. B. (*or* G. H.), referring to the
affidavits and proofs to be by her exhibited in verification
of what she so alleged, prayed

(Here state the prayer of respondent.)

(Signed) C. B.
 or
 G. H.

Conclusion.

*Ibid. con-
clusion.*

A. B.,
 against
C. B., and
R. S.

On the day of 19 .

A. B., the petitioner (*or* C. D., the solicitor for 'A' B.,
the petitioner), in reply to the allegations of C. B. (*or*
G. H.) in her answer, bearing date denied the same
in great part to be true or relevant.

Wherefore he alleged and prayed as before.

(Signed) A. B.
 or
 C. D.

**Act on
Petition.**

FORM 60.

Copy.
Pleadings in
an act on
petition
actually
tried.

Act on
petition.

Act on Petition.

[*Commencement as in Form 59.*]

E. v. E.

On the day of , 19 , D. W., the solicitor
of R. E., the respondent, alleged that:—

1. This is a suit instituted by I. E. against her husband, R. E., for a dissolution of her marriage on the ground of his adultery and cruelty.
2. That the domicile of origin of the said R. E. was in the West Indies, and that he has never at any time acquired an English domicile, or even had anything in the nature of a permanent residence in this country.
3. That the said R. E. and the said I. E. were married in the year 19 , in New Zealand, and resided with their children at divers places in New Zealand down to the time when they came to England in the year 19 .
4. That from that time they lived together in divers places in England in furnished apartments, hotels, and furnished houses, which the said R. E. took from time to time until they separated by agreement in the month of , 19 .
5. That immediately after such separation the said R. E. left this country with his children, and has not at any time since had any home or place of abode within the jurisdiction of this honourable Court.

Wherefore the said D. W., referring to the affidavits and proofs to be by him exhibited in verification of what he so alleged, prayed that the said suit for dissolution of marriage might be dismissed with costs.

Act on
Petition.

Answer.

Answer.

[*Commencement as in Form 59.*]

E. v. E.

On the day of , 19 , J. J., the solicitor for I. E., the petitioner, in answer to the allegations in the act on petition, bearing date the day of , 19 , of R. E., alleged:—

1. That the said R. E. is an Englishman born in England of English parents.
2. That the father of the said R. E. was an officer in the English army.
3. That the father of the said R. E., after carrying on business as a sheep farmer in New Zealand, returned to England, where he died in the year 19 , being then a domiciled Englishman.
4. That in the year 19 , the said R. E. sold his property in New Zealand and came to England with the intention of remaining in England, and that from 19 up to the time when the citation in this suit was extracted he had a permanent and *bonâ fide* residence in England and was domiciled in England.
5. That the said R. E. since the year 19 , when he came to reside in England, has never lost his English domicile or acquired any other domicile.
6. That the said R. E. was never domiciled in New Zealand, and never lost his English domicile of origin.
7. That the Court has jurisdiction to entertain this suit for dissolution of marriage.

Wherefore the said J. J., referring to the affidavits and proofs to be by him exhibited in

**Act on
Petition.**

verification of what he so alleged, prayed that the act on petition might be overruled with costs, and that the Court would order the said R. E. to enter an absolute appearance and file an answer to the merits, or in default thereof that the petitioner might be allowed to proceed and prove the allegations in her petition.

Reply.**Reply.**

[*Commencement as in Form 59.*]

E. v. E.

The day of , 19 .

D. W., the solicitor for R. E., in reply to the allegations of I. E. contained in her answer filed herein on her behalf, says:—

1. That he denies the matters alleged in the 1st, 2nd, and 3rd paragraphs of the answer to be true.
2. And he says that the father of the said R. E. was born in the West Indies, of West Indian parents, and had his domicile of origin there; that he obtained a commission in the English army, and in the first instance joined a West Indian regiment, and on that regiment being disbanded was gazetted to the 59th regiment of infantry of the line.
3. That the said R. E. was born at Dover, in the county of Kent, while his said father was quartered at Plymouth with his said regiment, and when only a few weeks old was taken with his said father and the said regiment to Ceylon, and from the year 19 , when the said regiment returned to England, he remained with his father and with the said regiment at Plymouth and at Aberdeen, in Scotland, until the year 19 .
4. In the year 19 the father of the said R. E. left the army and went with his wife and family and the

said R. E. to settle permanently in New Zealand, when he bought certain estates and acquired a domicile.

Act on
Petition.

5. In the year 19 , having had a stroke of paralysis, the father of the said R. E. came to England for medical advice, and died in England in the year 19 , but he was not then a domiciled Englishman as alleged, nor did he ever acquire a domicile in England.
6. That if the said R. E. had an English domicile of origin as alleged, he lost such domicile and acquired a domicile in New Zealand long before his marriage with the said I. E., who was at the time of the said marriage domiciled in New Zealand.
7. That he denies the matters alleged in the fourth paragraph, and says that the said R. E. never acquired an English domicile and never had any permanent *bonâ fide* residence in England, and that before and at the time of the issuing of the citation in this suit, the said R. E. had ceased to have any residence in England.
8. That if the said R. E. ever acquired a domicile in England as alleged, he had abandoned it before and at the time of the issuing of the citation in this suit.

Wherefore the said D. W. prays as before.

Conclusion.

Conclusion.

On the day of , 19 , J. J., the solicitor for I. E., the petitioner, in answer to the allegations of D. W., the solicitor for R. E., in his reply bearing date the day of , 19 , denied the same in great part to be true and relevant.

Wherefore he alleged and prayed as before.

Act on
Petition.
Evidence.
Affidavits and
other proofs.

By rule 60, "Each party to the act on petition shall within eight days from that on which the last statement in answer is filed, file in the registry such affidavits and other proofs as may be necessary in support of their several averments."

Form of
hearing or
trial.

By rule 61, "After the time for filing affidavits and proofs has expired, the party filing the act on petition is to set down the petition for hearing in the same manner as a cause; and in the event of his failing to do so within a month, any party who has filed an answer thereto may set the same down for hearing, and the petition will be heard in its turn with other causes to be heard by the judge without a jury."

Act on
petition.
May be tried
by a jury.

[But the Court has a discretion under sect. 36 of the Divorce Act, 1857, as to the mode of trial of an act on petition. In spite of Divorce Rule 61, which probably did not contemplate issues of fact as likely to arise on the trial of an act on petition, and although on an act on petition questions of law are generally combined with the issues of fact, and inconvenience may result from a trial of such questions with a jury, the Court will not refuse a jury if one of the parties wish for it, although a jury is not the proper tribunal for the purpose according to the old practice: *Lowenfeld v. Lowenfeld*, (1903) P. 177; 72 L. J. P. 57; 89 L. T. 146 (in the Court of Appeal).]

Evidence
taken on
affidavit,
sed quare.

As will be gathered from the above rules, the evidence on the trial of an act on petition is taken on affidavit. At the same time, it is hardly credible that the Court would allow issues of fact to be tried by a jury on affidavit; and it is quite certain that the Court has the power to order the evidence to be taken orally, if it thinks fit.

Procedure,
fees and
costs.

An act on petition is tried in the same way as an ordinary cause, and the same fees and costs are allowed.

[As to "*Custody, &c. of Children*" and "*Alimony and Maintenance*," see ante, Part I., Chap. VIII., pp. 139—147, and Chap. IX., pp. 148—168; also *tit.* "*Practice as to Custody, &c.*, p. 444, "*Alimony, &c.*, p. 446.]

Practice in Suits for Judicial Separation.

(See ante, Part I., Chap. III., p. 61.)

A suit for judicial separation must be commenced by filing a petition. (*Rule 1, ante, p. 285.*)

The two principal distinctions between suits for dissolution of marriage and for judicial separation are— (1) Whereas adultery is a necessary element in a petition for dissolution, whether filed by a husband or a wife, it is not necessary to allege adultery in every petition for judicial separation; and (2) a decree of judicial separation does not operate as a divorce *a vinculo matrimonii*; in other words, it does not dissolve the marriage tie, so that neither of the parties can marry again during the lifetime of the other unless one or other of them has taken proceedings for and obtained a decree of dissolution.

Either a husband or a wife can obtain a judicial separation on any one or other of the following grounds:— Adultery, cruelty (*ante, pp. 61—68*), or desertion (*ante, pp. 69—77*).

In a suit for judicial separation by a husband, alleged adulterers are not made co-respondents, as sect. 28 of the Mat. C. Act, 1857 (*see ante, p. 285*), only applies to suits for dissolution of marriage.

Neither can a person charged with adultery with one or other of the parties to a suit for judicial separation obtain leave to intervene and make themselves parties to the suit, as in a suit for dissolution of marriage. (*See ante, pp. 353—355.*)

[*The practice as to petition, affidavit in verification, citation, fees and costs, is the same in suits for judicial separation as in suits for dissolution of marriage. See ante, pp. 288—319.*]

Suit for judicial separation must be commenced by petition. Distinction between decrees for judicial separation and decrees for dissolution of marriage.

Judicial separation, grounds for.

Ibid. alleged adulterers not made co-respondents in suits for.

Neither can they obtain leave to intervene.

**Judicial
Separation.**

Petition for,
by husband,
form of.

The following is a simple form of petition for judicial separation by a husband on the ground of his wife's adultery:—

FORM 61.

In the High Court of Justice,
Probate, Divorce and Admiralty Division.
(Divorce.)

To the Right Honourable the President of the said
Division.

The day of , 19 .

The petition of Timothy Trowse, of 125, King Edward's Hill, Yarmouth, in the county of Norfolk, sheweth—

1. That your petitioner was on the day of , 19 , lawfully married to Charlotte Trowse. (*Continue as in Form 1, paragraph 1, ante, p. 288.*)
2. That after his said marriage your petitioner lived and cohabited with (*as in Form 1, paragraph 2, ante, p. 289.*)
3. That on the day of , 19 , and (*as in Form 2, paragraph 3, ante, p. 290.*)
4. That in during the months of (*as in Form 2, paragraph 4, ante, p. 291.*)

[*Add paragraphs 5 and 6 of Form 2, ante, p. 291, to meet requirements of rules 219, 220, ante, pp. 287, 288.*]

Your petitioner therefore humbly prays—

That your Lordship will be pleased to decree that he may be judicially separated from the said Charlotte Trowse (*or the respondent*), together with such other and further relief in the premises as to your Lordship may seem meet.

Or,

That your Lordship will be pleased to decree him—

1. A judicial separation.

2. The custody of his children.

3. Such other and further relief as is
meet.

(Signed) TIMOTHY TROWSE.

Judicial
Separation.

Petition for,
by husband,
form of.

[*Endorsement as in Form 6, ante, p. 297.*]

FORM 62.

[*The same by wife. Title as in Form 61.*]

Ibid. by wife.

The petition of Charlotte Trowse, of The Loke Cottage, St. Mary-in-the-Marsh, in the county of Suffolk, sheweth—

1. That your petitioner (then Charlotte Reedham, spinster) was on the day of , 19 , lawfully married to Timothy Trowse at .
(*Continue as in Form 1 (wife's petition), paragraph 1, ante, p. 290.*)
2. That after her said marriage your petitioner lived and cohabited with her said husband (*or the respondent*) at (*as in Form 1, paragraph 2, ante, p. 289*).
3. That on the day of , 19 , and on divers days between that date and , the said Timothy Trowse (*or the respondent*), at 125, King Edward's Hill, Yarmouth, in the county of Norfolk, committed adultery with Jane Brundell, a servant then in the employment of himself and your petitioner.
4. That on or about the day of , 19 , the said Timothy Trowse (*or the respondent*), at 125, King Edward's Hill aforesaid, committed adultery with Edith Haddiscoe.

[*Add paragraphs 5 and 6 of Form 2, ante, p. 291, to meet requirements of rules 219, 220.*]

[*Conclude with prayer, as in Form 61.*]

(Signed) CHARLOTTE TROWSE.

[*Endorsement as in Form 6, ante, p. 297.*]

Judicial Separation.

Petition for judicial separation, contents of, general observations as to.

Charges of more than one class of matrimonial offence not necessary in suits for judicial separation.

Affidavit verifying petition necessary, as in suits for dissolution.

It is useless to multiply precedents of forms of petition in suits for judicial separation. Petitions to meet every case may be drafted from the precedents of petitions for dissolution of marriage. (*See Forms 1, 2, 3, 4, 5 and 6, ante, pp. 288—297, adding in every case paragraphs 5 and 6 of Form 2, ante, p. 291, to meet the requirements of rules 219, 220, ante, pp. 287, 288, and taking the prayer from Form 61, ante, pp. 406, 407.*) Also, it must be always borne in mind that it is not necessary to allege several matrimonial offences of different kinds in a petition for judicial separation. Either a husband or a wife can get a decree of judicial separation on the ground of adultery alone, cruelty alone, or desertion alone. Therefore it is unnecessary in the petition to charge adultery and cruelty, or adultery and desertion, although such a course is necessary where a wife is petitioning for a dissolution of her marriage.

Rules 2 and 3 (*ante, p. 298*) apply equally to suits for judicial separation, and an affidavit verifying the petition must be sworn, the practice as to which is identically the same as in suits for dissolution. (*Ante, pp. 298, 299.*)

FORM 63.

Ibid. form of. **Affidavit verifying Petition for Judicial Separation.**

In the High Court of Justice,
Probate, Divorce and Admiralty Division.

(Divorce.)

TROWSE (Timothy)

v.

TROWSE (Charlotte).

Or,

Between Timothy TROWSE, petitioner, and
Charlotte Trowse, respondent.

[*As the alleged adulterer is not made a co-respondent, his name does not appear on the record.*]

In the matter of the Petition of Timothy Trowse for
Judicial Separation.

**Judicial
Separation.**

[*The rest of the affidavit is the same as Form 7, ante,
p. 298; endorsement as in Form 8, ante, p. 299.*]

Citations are as necessary in suits for judicial separation as in suits for dissolution of marriage, and the practice as to them is identical in both classes of suits. (*See ante, pp. 301—315.*)

FORM 64.

**Citation by a Husband or Wife for a Judicial
Separation.**

By wife
or husband
in suits
for judicial
separation,
form of.

In the High Court of Justice,
Probate, Divorce and Admiralty Division.
(Divorce.)

GEORGE V., by the Grace of God, of the United Kingdom
of Great Britain and Ireland and of the British
Dominions beyond the Seas, King, Defender of
the Faith.

To C. D., of .

WHEREAS A. B., of , claiming to have been law-
fully married to you, has filed his (*or her*) petition against
you in the Divorce Registry of our said Court, praying
for a judicial separation, wherein she alleges that you have
been guilty of adultery;

or,

Cruelty towards her (*or him*);

Entries in
citation.

or,

Desertion of her (*or him*) without cause for two years
and upwards;

or,

Adultery and cruelty towards her;

or,

Adultery and desertion of her without cause for two
years and upwards;

Judicial
Separation.

Citation,
entries in.

or,

Cruelty towards him (*or* her) and desertion of him (*or* her) without cause for two years and upwards;

or,

Adultery and cruelty towards her and desertion of her without cause for two years and upwards;

or,

Praying for a judicial separation, you having failed to comply with a decree made by the Court in a suit instituted by him (*or* her), for restitution of conjugal rights, and dated the day of , 19 .

Now THIS IS TO COMMAND YOU (*as in Form 9, ante, pp. 301, 302*).

Practice as to.

In every case the entries in the citation follow the charges in the petition, word for word.

For all other matters of practice with respect to citations, *see ante, pp. 301—315*.

Guardian
ad litem.

Where a petitioner or respondent in a suit for judicial separation is a minor or a lunatic or invalid, a guardian *ad litem* must be appointed.

Practice, same
as in suits for
dissolution.

The practice is the same in suits for dissolution. (*See ante, pp. 319—328*.)

Ibid. amend-
ment of
pleadings.

The practice as to amendment of pleadings is the same as in suits for dissolution. (*See ante, pp. 328—336*.)

Ibid. appear-
ance, answer,
reply, and
subsequent
pleadings.

So also is the practice as to entering appearance and filing answer, reply, and subsequent pleadings and particulars. (*See ante, pp. 337—368*.)

Answers to
suits for
judicial
separation.

It seems unnecessary to give any special forms of answer to petitions for judicial separation, as they can easily be framed from the answers to suits for dissolution of marriage. (*See Forms 32, 33, 34 and 35, ante, pp. 344—350*.)

Ibid.
affidavit

They must in like manner, whenever containing any matter beyond a simple denial of the facts stated in the

petition, be accompanied by an affidavit verifying such other matter, and negating collusion and connivance, unless collusion or connivance be a part of the answer. (For form of such affidavits, see ante, Form 39, p. 352.)

Judicial Separation.

verifying answer.

Relief by answer has always been given in suits for judicial separation (ante, p. 342). The practice is the same as in suits for dissolution (*ibid.*).

Ibid. relief by answer given;

But this only means such relief as could be given in the ecclesiastical courts, as a divorce *a thoro et mensâ* (now called a judicial separation, Mat. C. Act, 1857 (20 & 21 Vict. c. 85), s. 7), restitution of conjugal rights, jactitation of marriage, or nullity. A dissolution of marriage cannot be prayed for in the answer to a suit for judicial separation. The respondent must file a cross petition. (See ante, pp. 343, 367, 368.)

but only such relief as might have been given in the ecclesiastical courts.

The practice as to setting down cause, notice, hearing and trial up to decree is the same in suits for judicial separation as in suits for dissolution of marriage. (See ante, pp. 368—388.)

Setting down notice, &c. and hearing of suits for judicial separation.

[Under sect. 28 of the Mat. C. Act, 1857 (20 & 21 Vict. c. 85), the Court has power to order a suit for judicial separation to be tried by a jury if either of the parties desire it, but it has been held that it is not obligatory on it to do so. *Marchmont v. Marchmont* (1858), 1 S. & T. 228; 27 L. J. P. 59.]

Jury.

The decree pronounced in a suit for judicial separation is a final decree; that is to say, it takes effect immediately from the day on which it is dated. (See post, pp. 488, 489.)

Decree in suits for judicial separation.

[The practice as to suing in formâ pauperis and appearing under protest applies equally to all matrimonial suits. See ante, pp. 389—395.]

Suing in formâ pauperis, and appearing under protest.

By sect. 23 of the Mat. C. Act, 1857 (20 & 21 Vict. c. 85), power is given to a respondent to a suit for judicial separation to petition for a reversal of the decree pronounced against him or her. (See ante, p. 81.)

Reversal of decree of judicial separation.

**Judicial
Separation.***Ibid.*
petition for.

By rule 63, "A petition to the Court for the reversal of a decree of judicial separation must set out the grounds on which the petitioner relies."

By rule 64, "Before such a petition can be filed, an appearance on behalf of the party praying for a reversal of the decree of judicial separation must be entered in the cause in which the decree has been pronounced."

Service of,
and answer.

By rule 65, "A certified copy of such a petition, under seal of the Court, shall be delivered personally to the party in the cause in whose favour the decree has been made, who may within fourteen days file an answer thereto in the registry, and shall on the day on which the answer is filed deliver a copy thereof to the other party in the cause, or to his or her proctor, solicitor, or attorney."

Subsequent
pleading.

And by rule 66, "All subsequent pleadings and proceedings arising from such petition and answer shall be filed and carried on in the same manner as before directed in respect of an original petition for judicial separation, and answer thereto, so far as such directions are applicable."

FORM 66.Petition for,
form of.**Petition for the Reversal of a Decree of Judicial
Separation.**

In the High Court of Justice,
Probate, Divorce and Admiralty Division.

(Divorce.)

To the Right Honourable the President of the said
Division.

The day of , 19 .

The petition of A. B., of , in the county of ,
sheweth—

1. That your petitioner was on the day of ,
19 , lawfully married to C. B., at .

2. That on the day of , your Lordship, by your final decree, pronounced in a cause then depending in this Court, entitled A. B. against C. B., decreed as follows; to wit:

Judicial
Separation.

[Here set out the decree.]

3. That the aforesaid decree was obtained in the absence of your petitioner, who was then residing at

[State facts tending to show that the petitioner did not know of the proceedings; and further, that had he known of them he might have offered a sufficient defence.]

Or,

That there was reasonable ground for your petitioner leaving his said wife, for that his said wife

Petition for
reversal of
decree of,
form of.

[Here state any legal grounds justifying the petitioner's separation from his wife.]

Your petitioner therefore humbly prays—

That your Lordship will be pleased to reverse the said decree, that your petitioner may have such other and further relief in the premises as to your Lordship may seem meet.

Or, if preferred,

That your Lordship will be pleased to order:

1. That the said decree be reversed.
2. Such further and other relief as is meet.

(Signed) A. B.

[As to "custody, &c. of children" and "alimony," see ante, Part I., Chaps. VIII., pp. 139—147, and IX., pp. 148—168; also titles, "Practice as to Custody," &c., p. 442, "Alimony," &c., p. 446. For fees and costs, see post, pp. 540—603.]

RESTITU-
TION OF
CONJUGAL
RIGHTS.

Practice in Suits for Restitution of Conjugal Rights.

(See ante, *Part I., Chap. IV., pp. 83—92.*)

Commenced
by petition
and affidavit
in verification.

Suits for restitution must be commenced by petition (*rule 1, ante, p. 285*) and affidavit in verification (*rule 2, ante, p. 298*).

Written
demand for
cohabitation
required
before filing
petition.

But by rule 175, "The affidavit filed with the petition, as required by rule 2, shall further state sufficient facts to satisfy one of the registrars that a written demand for cohabitation and restitution of conjugal rights has been made by the petitioner upon the party to be cited, and that after a reasonable opportunity for compliance therewith such cohabitation and restitution of conjugal rights have been withheld."

Nature of
demand
required by
rule 175.

[The demand required by rule 175 may be written by the solicitor for, or a friend of, the petitioner, as well as by the petitioner, but it must be conciliatory and show willingness to return to cohabitation (*Field v. Field* (1889), 14 P. D. 26; 58 L. J. P. 21; 59 L. T. 880; *Mason v. Mason* (1889), 61 L. T. 304); but if civil, and showing desire for cohabitation, it may threaten legal proceedings in case of refusal: *Smith v. Smith* (1890), 15 P. D. 47; 59 L. J. P. 9; 62 L. T. 237. Although it must not be a hostile demand, it can hardly be expected to be of an affectionate nature, and, provided the request is clear, the Court will not inquire too closely into the peremptory character of the precise words which are used: *Elliott v. Elliott* (1902), 85 L. T. 648. Where a petitioner had sent two such demands to her husband, by registered letter, both of which had been returned unopened by the husband's solicitor, who subsequently refused to give the husband's address, or that of any third person through whom he might be communicated with, and it was also shown that the husband had left the country, the Court made an order for substituted service of such demand upon the husband's solicitor: *Tucker, Ex parte*, (1897) P. 83; 66 L. J. P. 65; 77 L. T. 140.]

Demand re-
turned twice
unopened.
Refusal by
solicitor to
assist
petitioner.
Substituted
service
ordered.

When the demand for cohabitation is made by a husband, it should give the address where he desires his wife to come to him.

When made by a wife, if she is still residing at the matrimonial home, she should ask her husband to return home; if otherwise, she should ask him to receive her, where he is living at the time, or that he will inform her at what address he is willing to receive her.

The affidavit should show either that the demand under rule 175 was personally served, or else satisfy the registrar that it was received by the proposed respondent, or at least that it was posted in a registered letter to the address at which he or she was residing. Otherwise an order will have to be obtained for substituted service of the demand.

[An order for substituted service is obtained, as in case of a citation. See ante, p. 308 et seq.]

When the registrar has approved the affidavit and marked it to that effect, the petition and affidavit can be filed, and the citation extracted.

FORM 67.

Petition for Restitution of Conjugal Rights.

[Commencement and paragraphs 1 and 2 as in Form 1.]

3. That the said A. B. did, on the day of ,
19 , withdraw from cohabitation with your petitioner, and has kept and continued away from her without any just cause whatsoever, and from thence hitherto has refused and still refuses to render her conjugal rights.

[Insert here paragraphs 5 and 6 of Form 2, ante, p. 291, to satisfy rules 219 and 220, ante, pp. 287, 288.]

**Restitution
of Conjugal
Rights.**

Demand should indicate place to which party is asked to return to cohabitation.

Affidavit must satisfy registrar that demand was personally served or received by proposed respondent or at least sent in registered letter to his or her proper address; otherwise order for substituted service of demand required.
Affidavit approved by registrar; petition filed and citation extracted.

Petition for restitution, form of.

Restitution
of Conjugal
Rights.

Your petitioner therefore humbly prays—

That the Court will decree a restitution of conjugal rights to your petitioner from the said A. B., and that he pay the costs of and incident to this petition, and that your petitioner have such other and further relief as to your Lordship seems meet.

Or, if preferred:

That your Lordship will be pleased to decree her:

1. Restitution of conjugal rights.
2. Such further and other relief as is meet.

[Petitioner's signature.]

Affidavit
verifying
petition,
form of.

The affidavit verifying the petition will be as in Form 7 (ante, pp. 298, 299), with the addition of the matter relating to the demand for cohabitation shown *supra*; but it need not contain paragraph 3 (ante, p. 299), denying collusion and connivance.

Suit for
restitution
may be
stayed.

By rule 176, "At any time after the commencement of proceedings for restitution of conjugal rights the respondent may apply by summons to the judge, or to the registrars in his absence, for an order to stay the proceedings in the cause by reason that he or she is willing to resume or to return to cohabitation with the petitioner."

[Except as above, the practice in suits for restitution of conjugal rights is the same as in suits for dissolution of marriage. See "Petition," ante, pp. 288—297, 299; "Affidavit Verifying," 298—300; "Citations," 301—315; "Guardianship," 319—328; "Amendment of Pleadings," 328—336; "Appearance," 337—341; "Answer and Subsequent Pleadings," 341—353, 355—357; "Cross Petitions and Consolidation," 367, 368; "Hearing or Trial," 368—388; "Suing in formâ Pauperis," 389—395; "Appearance under Protest," 395—404.]

Claiming
relief by
answer to

The same class of relief (and no other) may be prayed for in the answer to a suit for "restitution of marriage"

as in the answer to a suit for "judicial separation." (See ante, pp. 410, 411.)

Restitution
of Conjugal
Rights.

FORM 68.

suit for
restitution

Answer to a Suit for Restitution of Conjugal Rights.

[Commencement as in Form 32, p. 344.]

1. That he denies that he has without any just cause refused or still refuses to permit the petitioner to live and cohabit with him, or to render her conjugal rights.

Answer to
suit for
restitution,
form of.

Or,

That by reason of the circumstances set forth hereinafter, the respondent had and still has reasonable cause for refusing to permit the petitioner to live and cohabit with him, and for refusing to render her conjugal rights.

[Proceed to countercharge adultery, cruelty, or desertion, or any other misconduct of which the petitioner may have been guilty, and conclude with prayer for rejection of petition and for the relief asked for, as "judicial separation," "custody of children," &c. A dissolution of marriage can only be claimed by a cross petition. If the respondent desires to allege nullity, it should be done, and relief prayed in one of the Forms of Petition for Nullity of Marriage, post, pp. 425—431.]

Verify all countercharges by affidavit, as in Form 63.]

FORM 69.

Citation in a Suit for Restitution of Conjugal Rights.

[Title and commencement as in Form 9, p. 301.]

To C. B., of , in the county of .

WHEREAS A. B., of , in the county of ,

D.M.C.

Citation in
suit for
restitution of
conjugal
rights,
form of.

**Restitution
of Conjugal
Rights.**

claiming to have been lawfully married to you, has filed his petition against you in the Divorce Registry of our said Court, praying for a restitution of conjugal rights. NOW THIS IS TO COMMAND, &c. (*Conclude as in Form 9, ante, pp. 301, 302.*)

Deed of
separation
must be
specially
pleaded
in answer.

[If it is desired to set up an agreement for separation, previously entered into between the parties, as a bar to a decree for restitution of conjugal rights, such agreement must be specially pleaded in the respondent's answer. *Hardie v. Hardie* (1901), 70 L. J. P. 29; 84 L. T. 64.]

Decree,
form of.

The decree in a suit for restitution of conjugal rights is a final decree in the first instance.

[See post, title "*Practice as to Decree and Intervention*," p. 487.]

Wife ordered
to return to
husband
within fixed
time.

If the respondent be the wife, she will be ordered to return to cohabitation with her husband within a fixed time.

Husband
ordered either
to return to
wife or to
receive her
within fixed
time, and
file certificate
showing
obedience.

If the respondent be the husband, he will be ordered to take back his wife, or to return to her (*as the case may be*), within a fixed time, and, further, to file a certificate in the registry that he has obeyed the decree.

Almost any form of certificate will do. It should be headed in the cause, and commence more or less thus:—

“CERTIFICATE.

Certificate,
contents of.

“THIS IS TO CERTIFY that I have, pursuant to the order of this honourable Court, served on me upon the 5th day of October, 19 ,” and then proceed to show where he has provided a matrimonial home, that he has given notice to his wife that he has done so, and requested her to join him there. It must be, of course, dated and signed by the respondent.

Usual fee
paid.

The usual fee for filing all documents, 2s. 6d., must be paid on filing this certificate.

A sealed copy of the decree should be personally served on the respondent, otherwise it will become necessary to apply for substituted service.

Restitution
of Conjugal
Rights.

Personal
service.
Service on
respondent
out of
jurisdiction.

[If substituted service is applied for, it must be done in the same way as an application for substituted service of a citation. See ante, pp. 308 et seq.]

If a respondent in a suit for restitution is a domiciled Englishman, he may be served with any proceeding in such suit anywhere outside the jurisdiction of the Court. *Dicks v. Dicks*, (1899) P. 275; 68 L. J. P. 118; *Hardie v. Hardie* and *Bateman v. Bateman*, (1901) P. 136; 70 L. J. P. 29; 84 L. T. 64, 331.

If a respondent is served with a decree for restitution abroad, he should be allowed sufficient time to return to this country and comply with the order, if he desires to do so; and if the petitioner takes further proceedings in consequence of the respondent's non-compliance with such decree, such petitioner must satisfy the Court that sufficient time has been given to comply with it. *Bateman v. Bateman*, (1901) P. 136; 70 L. J. P. 29; 84 L. T. 331.

Limit of
time in which
to comply
with decree
to return to
cohabitation.

Where a wife respondent was evading service of a decree and an order for custody of children (*as to which, see title "Practice as to Custody and Access"*), the Court of Appeal, although she was not abroad, ordered a writ of sequestration to issue, without service of the decree or order. *Allen v. Allen* (1885), 10 P. D. 187; 54 L. J. P. 77; see also *Hyde v. Hyde* (1888), 13 P. D. 166; 57 L. J. P. 89; 59 L. T. 529.

Wife evading
service of
decree, and
also order for
custody of
children.

As to the effect of a decree of restitution on subsequent proceedings between the same parties, by virtue of the provisions of the Mat. C. Act, 1884, see ante, Part I., pp. 84 et seq.; and as to custody, &c. of children, and "alimony," see ante, Part I., Chaps. VIII. (pp. 139—147) and IX., pp. 148—168; also titles "Practice as to Alimony, &c.," p. 446, and "Custody, &c.," p. 444. For fees and costs, see post, pp. 540—603.]

JACTITA-
TION.

Practice in Suits for Jactitation of Marriage.

Jactitation of marriage, what is.

[As to what is a suit for jactitation of marriage, see ante, Part I., Chap. V., pp. 93, 94.]

Practice same as in other suits.

The proceedings are commenced by a petition, and from that point up to decree the practice is the same as shown in the foregoing pages.

References for practice.

[See ante: "*Petition*," pp. 288—297; "*Affidavit in Verification*," 298—300; "*Citation*," 301—315; "*Guardianship*," 319—328; "*Amendment of Pleadings*," 328—336; "*Appearance*," 337—341; "*Answer and Subsequent Pleadings*," 341—353; "*Cross Petitions and Consolidation*," 367—368; "*Hearing or Trial*," 368—388; "*Suing in formâ pauperis*," 389—395; "*Appearance under Protest*," 395—404.]

FORM 70.

Petition for jactitation of marriage, form of.

Petition in a Suit for Jactitation of Marriage.

In the High Court of Justice,
Probate, Divorce and Admiralty Division.
(Divorce.)

To the Right Honourable the President of the said Division.

The day of , 19 .

The petition of William Whitlingham, of , in the county of , Master Brickmaker (see rule 220, ante, p. 288), sheweth—

1. That Ann Evans, falsely calling herself Ann Whitlingham, of , in the county of , did in or about the month of , 19 , at , in the county of , and in divers other places, wilfully and without the authority of your peti-

tioner, boast and assert that she was the wife of Jactitation.
your petitioner.

2. That your petitioner is not, and never at any time has been, married to the said Ann Evans.
3. That the said Ann Evans refuses to desist from boasting and asserting that she is the wife of your petitioner.

[Insert here two paragraphs in the identical words of paragraphs 5 and 6 of Form 2, ante, p. 291, to comply with rules 219, 220, ante, pp. 287, 288.]

Your petitioner therefore humbly prays—

That your Lordship will be pleased to decree that the said Ann Evans do cease and desist from boasting or asserting that she is the wife of your petitioner, and that she be enjoined perpetual silence in the premises.

And that your petitioner may have such further and other relief in the premises as to your Lordship may seem meet.

Or, if preferred :

That your Lordship will be pleased to grant him—

1. A decree of perpetual silence against the said Ann Evans.
2. Such further and other relief as is meet.

[Petitioner's signature.]

[Verify by affidavit, as in Form 7, ante, pp. 298, 299.]

The paragraph denying collusion and connivance under rule 3 (ante, p. 298) is required by the practice in suits for jactitation, though dispensed with in suits for restitution of conjugal rights.

**Affidavit
must deny
collusion and
connivance.**

Jactitation.

FORM 71.

Citation in a Suit for Jactitation of Marriage.Citation,
form of.*[Commencement as in Form 9, p. 301.]*

To Ann Whitlingham (otherwise Ann Evans),
of , in the county of .

WHEREAS William Whitlingham, of , in the
county of , has filed his petition against you in the
Divorce Registry of our said Court, praying that you may
be ordered to cease and desist from boasting and asserting
that you are the wife of the said William Whitlingham,
and that you be enjoined perpetual silence in the pre-
mises. NOW THIS IS TO COMMAND YOU, &c. (*Conclude as
in Form 9, p. 301.*)

FORM 72.

Answer to a Suit in respect of Jactitation of Marriage.Suit in
respect of
jactitation;
answer,
form of.

In the High Court of Justice,
Probate, Divorce and Admiralty Division.

(Divorce.)

WHITLINGHAM (William)

v.

WHITLINGHAM (Ann), sued as EVANS
(Ann).

Or,

Between William WHITLINGHAM, petitioner,
and

Ann WHITLINGHAM (sued as Ann EVANS),
respondent.

The respondent, Ann Whitlingham, by her solicitor, in
answer to the petition filed in this cause, saith—

1. That she denies that she boasted or asserted that she
was married to the said petitioner, as alleged in the
said petition.

2. That on the day of , 19 , at the parish Jactitation.
 church of , in the county of , the
 respondent was lawfully married to the said peti-
 tioner.
3. That the said William Whitlingham has ever since
 about the month of , 19 , without any just
 cause refused and still refuses to live and cohabit
 with the respondent, or to render her conjugal
 rights.

Wherefore the respondent humbly prays—

That your Lordship will be pleased to reject
 the prayer of the said petition, and to de-
 clare that the respondent was on the
 day of , 19 , lawfully married to the
 said William Whitlingham, as alleged in
 her answer, and to decree that the said
 William Whitlingham do receive the re-
 spondent as his wife, and render to her
 conjugal rights. And that the respondent
 may have such further and other relief as
 to your Lordship may seem meet.

*Or, a shorter and in every way equally efficacious
 form would be :*

That your Lordship will be pleased to reject
 the prayer of the said petition, and to grant
 her—

1. A declaration that she is the lawful
 wife of the said William Whitling-
 ham (*or* the petitioner).
2. A decree of restitution of conjugal
 rights.
3. Such other and further relief as is
 meet.

This answer must be verified by an affidavit, which
 must deny collusion and connivance. (*See Form 39,*
p. 352.)

Answer must
 be verified
 by affidavit
 denying
 collusion and
 connivance.

Jactitation.

Decree,
form of.

The decree in this suit is final, and the wording of it will follow the wording of the citation (*ante*, *p.* 422; *see also post*, *p.* 489.)

Undefended
case; jury.
No decree
where
petitioner
acquiesced in
boasting.

[The Court will not order an undefended suit for jactitation to be tried by a jury (*Thompson v. Rourke*, (1892) *P.* 244; 61 *L. J. P.* 132; 67 *L. T.* 137), neither will it decree perpetual silence if the petitioner has at any time acquiesced in the boasting. *Ibid.*, (1893) *P.* 70; 62 *L. J. P.* 46; 67 *L. T.* 788. Both these decisions were in the Court of Appeal.]
(*For fees and costs, see post, pp.* 540—603.)

NULLITY.

Practice in Suits for Nullity.

For the grounds on which a party to a marriage is entitled to petition for a decree of nullity, see Part I., Chap. VI., *ante*, pp. 95—132. Nullity,
grounds for.

Suits for nullity are commenced by petition. The practice is the same as in suits for dissolution. (*See ante*, pp. 288—297.) Suit com-
menced by
petition.

[*As to who may file a petition for nullity of marriage, besides the parties to the marriage themselves, see ante*, p. 104.] Who may
petition for.

The following forms of petitions in suits for nullity will be found useful:—

FORM 73.

**Petition for Nullity by reason of Undue Publication
of Banns.** Nullity by
reason of
undue
publication
of banns.

In the High Court of Justice,
Probate, Divorce and Admiralty Division.
(Divorce.)

**Form of
petition.**

To the Right Honourable the President of the said
Division.

The 10th day of August, 19 .

The petition of Camilla Oulton (otherwise Carlton), of Beccles, in the county of Suffolk (*or* “of Obadiah Oulton, butcher (*see rule* 220, *ante*, p. 288), of Potter Heigham, in the county of Norfolk”), sheweth—

1. That on or about the 9th day of May, 19 , at the parish church of St. Margaret, Lowestoft, in Suffolk aforesaid (*or* “in the county of Suffolk”), a ceremony of marriage took place between your petitioner (then Camilla Carlton, spinster) and Obadiah Oulton, butcher (*see rule* 220, *ante*, p. 288), of Potter Heigham, in the county of

Nullity.

Norfolk (or "Camilla Carlton, of Beccles, in the county of Suffolk").

2. That the said ceremony of marriage took place in pursuance of banns, and after the banns of the said marriage had been published in the names of William Smith and Alice Brown.
3. That no licence had been obtained for the solemnization of the said ceremony of marriage.
4. That at the time of the publication of the said banns as aforesaid, the true names of the alleged William Smith and Alice Brown were Obadiah Oulton and Camilla Carlton, but that notwithstanding the same, your petitioner and the said Obadiah Oulton (or "Camilla Carlton") knowingly and wilfully caused the said banns to be published in the names of William Smith and Alice Brown as aforesaid.

[Insert paragraphs 5 and 6 as in Form 2, ante, p. 291, substituting the words "ceremony of marriage" for the word "marriage."]

Wherefore your petitioner humbly prays—

That your Lordship will be pleased to decree that the said ceremony of marriage celebrated as aforesaid, between your petitioner and the said Obadiah Oulton (or "Camilla Carlton") is null and void, and that your petitioner may have such further and other relief in the premises as to your Lordship may seem meet.

Or, if preferred:

That your Lordship will be pleased to grant her—

1. A decree of nullity of marriage.
2. Such further and other relief as is meet.

(Signed) CAMILLA CARLTON,

or

OBADIAH OULTON.

FORM 74.

Nullity.

Petition for Nullity of Marriage alleging Impotency by reason of Malformation, Frigidity, &c.

On ground of physical incompetence.

[Commencement and paragraph 1 as in Form 73.]

Form of petition.

2. That the said Obadiah Oulton was at the time of the said ceremony of marriage, and has ever since been, wholly unable to consummate the said marriage, owing to the malformation of his parts of generation.

2a. That the said Obadiah Oulton was at the time of the said ceremony of marriage, and has ever since been, and still is, wholly unable to consummate the said marriage by reason of the frigidity and impotence of his parts of generation.

2b. That the said Obadiah Oulton was at the time of the said ceremony of marriage, and has ever since been, and still is, wholly unable to consummate the said marriage by reason of the malformation, or frigidity and impotence of his parts of generation, or hysteria, or from some other physical cause, the exact nature of which is to your petitioner at present unknown.

3. That the said malformation, frigidity, or impotence of the parts of generation of the said Obadiah Oulton is wholly incurable by art or skill, and will so appear upon inspection.

3a. That the said malformation, frigidity, or impotence or other physical cause affecting the parts of generation of the said Obadiah Oulton, and rendering him incapable of consummating the said marriage, is wholly incurable by art or skill, and will so appear upon inspection.

[Continue and conclude as in Form 73, from paragraph 4 onwards.]

(Signed) CAMILLA CARLTON.

Nullity.*Or,*

2. That by reason of the malformation, frigidity, or impotence of the said Camilla Carlton, or by reason of some other physical defect in the said Camilla Carlton, rendering her incapable of consummating the said marriage, your petitioner was at the time of the said marriage, and has ever since been, and still is, wholly unable to consummate the said marriage.
3. That such malformation, frigidity, or impotence, or other physical defect in the said Camilla Carlton, as in the last paragraph set forth, is incurable by art or skill, and will so appear on inspection.

[Continue and conclude as in Form 73 from paragraph 4 onwards.]

(Signed) OBADIAH OULTON.

FORM 75.

On ground of
insanity.

Form of
petition.

**Petition for Nullity of Marriage on the ground of
Insanity.**

[Commencement and paragraph 1 as in Form 73.]

2. That on the said day of , 19 , at the time of the performance of the said ceremony, and prior thereto, your petitioner was lunatic and incapable of contracting marriage, and that the said pretended marriage was brought about by the fraud, procurement, and contrivance of the said Obadiah Oulton (or "Camilla Carlton").

Or,

2. That on the said day of , 19 , when the said ceremony of marriage was in fact had between the said Obadiah Oulton and the said Camilla Carlton, the said Obadiah Oulton was, and for some time prior thereto had been, of unsound mind, and incapable of contracting marriage.

3. That the performance of the said ceremony of marriage was procured by the fraud and contrivance of the said Obadiah Oulton (or "Camilla Carlton").

Nullity.

[Continue and conclude as in Form 73 from paragraph 4 onwards.]

(Signed) CAMILLA CARLTON,
or
OBADIAH OULTON.

FORM 76.

Petition for Nullity on the ground of the Marriage being Bigamous.

On ground of
bigamy.
Form of
petition.

[Commencement as in Form 73.]

1. That on or about the 9th day of May, 1908, at the parish church of St. Margaret, Lowestoft, in Suffolk, aforesaid (or "in the county of Suffolk"), a ceremony of marriage took place between your petitioner and Obadiah Oulton, of Potter Heigham, in the county of Norfolk, butcher (or Camilla Barton, then known to your petitioner as, and believed by him to be, Camilla Carlton, spinster).
2. That prior to the 9th day of May, 1908, when the said ceremony of marriage took place between your petitioner and the said Obadiah Oulton (or "Camilla Barton"), that is to say, on the 10th day of June, 1901, at the parish church of Acle, in the county of Norfolk, the said Obadiah Oulton (or "Camilla Barton") was lawfully married to Isabella Oulton, then Isabella Isted, spinster (or "Benjamin Barton"), of , in the county of .
3. That on the 9th day of May, 1908, when the said ceremony of marriage took place between your petitioner and the said Obadiah Oulton (or "Camilla Barton"), as in the 1st paragraph set

Nullity.

forth, the said Isabella Oulton, the wife of the said Obadiah Oulton (or "Benjamin Barton, the husband of the said Camilla Barton"), was still living.

[Continue and conclude as in Form 73 from paragraph 4 onwards.]

(Signed) CAMILLA CARLTON,
or
OBADIAH OULTON.

FORM 77.

By reason of
affinity.
Form of
petition.

Petition for Nullity by reason of Affinity.

[Commencement and paragraph 1 as in Form 73, p. 425.]

2. That the said Obadiah Oulton was then a widower, having on the 10th day of March, 1903, been lawfully married to Lucy Oulton (then Lucy Carlton, spinster, and the natural and lawful sister of your petitioner) at the parish church of Carlton-next-Oulton, in Suffolk aforesaid.
3. That the said Lucy Oulton died on the 31st day of December, 1907.

Or,

2. That the said Camilla Carlton is the niece of the said Obadiah Oulton, being the natural and lawful daughter of his half-sister, Sarah Carlton, formerly Sarah Oulton, spinster.

[Continue and conclude as in Form 73, p. 425, from paragraph 4 onwards.]

(Signed) CAMILLA CARLTON,
or
OBADIAH OULTON.

Other forms
of petition.

The above forms of petition appear to be sufficient. Paragraphs to meet other grounds of nullity (as where the

parties have married between decree *nisi* and decree absolute) can easily be framed.

A petition for nullity, like a petition for dissolution, must be verified by affidavit, which must deny collusion and connivance. (*For practice and forms, see ante, pp. 298—300.*)

The petitioner must next extract a citation, as in suits for dissolution. (*For practice, forms, service, substituted service, fees, &c., see ante, pp. 301—315.*)

Nullity.

Affidavit in verification must deny collusion and connivance.

Citation necessary.

FORM 78.

Citation in Suit for Nullity.

Citation in nullity suit, form of and entries in.

[*Heading and commencement as in Form 9, p. 301.*]

To C. B., otherwise C. D., of , in the county of .

WHEREAS A. B., of , in the county of , has filed his petition against you in the Divorce Registry of our said Court, praying that the marriage (*or ceremony of marriage*) celebrated and solemnized at , in the county of , on the day of , 19 , between him (*or her*) and you may be pronounced null and void, by reason that the said marriage (*or ceremony of marriage*) was solemnized (1) without due publication of banns; *or* (2) without a licence having been first duly had and obtained; *or* (3) by reason that you and the said A. B. knowingly and wilfully consented or acquiesced in the pretended solemnization of such marriage by a person not being in holy orders (*or otherwise, as the case may be*); *or* (4) by reason of consanguinity between you and the said A. B.; *or* (5) by reason of affinity between you and the said A. B.; *or* (6) by reason of your impotence, frigidity, or hysteria, or incapacity for sexual intercourse existing at the time of the said alleged marriage; *or* (7) by reason of your former marriage with R. S., who was living at the time of your alleged marriage with the

Nullity.

said A. B. NOW THIS IS TO COMMAND, &c. (*Conclude as in Form 9.*)

Guardian
ad litem.

Cases as to.

In cases where an appointment of a guardian is necessary, for practice see *ante*, pp. 297—299.

[Where in a nullity suit a guardian *ad litem* has been assigned to a lunatic, if in the course of the suit it is alleged that the lunatic has recovered his or her sanity, the Court will not make a decree at the instance of the guardian till that question is settled. (*Hancock (falsely called Peaty) v. Peaty* (1867), L. R., 1 P. & D. 335; 36 L. J. P. 57; 16 L. T. 182.) No order ought to be made under rule 196 if there is a *bonâ fide* doubt as to the patient's sanity. See *Fry v. Fry* (1890), 15 P. D. 50; 59 L. J. P. 43; 62 L. T. 501.]

“ Amend-
ment of
Pleadings,”

“ Appear-
ance,” and

“ Answer,”

practice as to.

Answer and
subsequent
pleadings.

Relief by
answer in
nullity suits.

Decree of
restitution ;

or decree of
nullity on
prayer of
respondent
instead of
petitioner.

For practice as to amendment of pleadings, see ante, pp. 328—336; and as to appearance, see ante, pp. 337—341.

For practice as to answer, see ante, pp. 341—353, 355—357.

The Court can give relief by answer in suits for nullity; so a respondent who denies the allegations in the petition may pray for a restitution of conjugal rights without making the usual demand for return to cohabitation. (*See ante, p. 414.*) If a decree is pronounced, the practice will be as shown (*ante, pp. 418, 419*).

Where a decree of nullity is prayed for on the ground of impotence, &c., the respondent can allege that he or she was prevented from consummating the marriage by reason of the impotence, &c. of the petitioner, and pray for a decree of nullity to be pronounced on his or her prayer instead of on the prayer of the petitioner.

The only substantial answer where the validity of a marriage is disputed on the ground that the parties were not free to contract, or were within the prohibited degrees, or were physically or mentally incompetent to contract, is a traverse of the allegations in the petition.

Insincerity.

In order to raise the question of insincerity, it is necessary that the answer should specifically allege it (*a*).

(*a*) *S. (otherwise G.) v. S.*, (1907) P. 224; 76 L. J. P. 118.

On the other hand, when the marriage is disputed on the ground of some informality in its solemnization, then any of the defences suggested *ante*, Part I., Chap. VI., pp. 95—132, may be raised in answer to the petition.

The following forms of answer will be found useful as precedents:—

FORM 79.

Answer to a Petition for Nullity by reason of Undue Publication of Banns.

In the High Court of Justice,
Probate, Divorce and Admiralty Division.
(Divorce.)

The day of , 19 .

OULTON (otherwise CARLTON) (Camilla)
[or CARLTON (otherwise OULTON) (Camilla)]

v.

OULTON (Obadiah);

or,

Between Camilla OULTON (otherwise CARLTON)
[or Camilla CARLTON (otherwise OULTON)],
petitioner, and

Obadiah OULTON, respondent

(*if the petitioner be the wife*);

or,

OULTON (Obadiah)

v.

CARLTON (otherwise OULTON) (Camilla);

or,

Between Obadiah OULTON, petitioner, and
Camilla CARLTON (otherwise OULTON),
respondent

(*if the petitioner is the husband*).

The respondent, Obadiah Oulton (*or* “Camilla Oulton”), by her (*or* his) solicitor, in answer to the petition filed in this cause, saith—

1. That he (*or* she) denies that the petitioner and him-

By reason
of undue
publication
of banns;
form of
answer.

Nullity.

self (*or herself*) knowingly and wilfully caused the banns to be published in the names of William Smith and Alice Brown, and that no licence was obtained for the celebration of the said marriage as alleged in paragraphs 2 and 3 of the said petition.

2. That he (*or she*) was not aware at the time of the said marriage of the undue publication (if any) of the said banns.
3. That on the 9th day of May, 1908, at the parish church of St. Margaret, Lowestoft, in the county of Suffolk, the said respondent (*or* "the said respondent, then Camilla Carlton, spinster"), was lawfully married to the said petitioner.

Wherefore the respondent humbly prays—

That your Lordship will be pleased to reject the prayer of the said petition, &c. (*Continue and conclude as in Form 33.*)

[If it is desired to make countercharges, paragraph 4 will commence, "The respondent further saith," then follow the countercharges as in Form 33 (ante, p. 344); and if it is desired to ask for relief, conclude with a prayer, either for judicial separation, as in Form 61, ante, p. 406, or for restitution of conjugal rights, as in Form 67, ante, p. 415.]

FORM 80.

By reason of
impotence.
Form of
answer.

**Answer to a Petition for Nullity on the ground of
Impotence.**

[Commencement as in Form 79, p. 433.]

1. That he (*or she*) denies each and every one of the allegations contained in paragraphs 2, 2a, 2b, 3, and 3a of the said petition.
2. That the petitioner did consummate the said marriage so solemnized as aforesaid, and that the respondent was at the time of the said marriage, and from thence hitherto hath been and still is, apt for coition, as will appear on inspection.

- | | |
|--|---|
| <p>3. That the respondent was at the time of the said marriage, and from thence hitherto has been, and still is, apt for coition, as will appear on inspection, and the said respondent always has been, and still is, willing to consummate the said marriage, but has been hitherto prevented from doing so by reason of the malformation, &c. (<i>see Form 74, ante, p. 427</i>) of the petitioner.</p> | <p>Nullity.</p> <hr style="width: 100%;"/> |
|--|---|

4. The respondent further saith .

[Insert here countercharges, if it is desired to make any, and conclude with prayer as in Form 79, p. 433, or (if desired) with a prayer for a decree of nullity, as in Form 73, p. 425.]

<p>There can be no possible answer to a petition for nullity by reason of "insanity" or "affinity," except a denial of the facts alleged in the petition.</p>	<p>Nullity by reason of insanity or affinity.</p>
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<p>Of course, an insane respondent, appearing by his or her guardian <i>ad litem</i>, may allege that he or she has become insane since the marriage, but that can be proved under a simple traverse, as the insanity alleged in the petition must be insanity existing at the time of the marriage, insanity supervening afterwards being no ground for a decree of nullity.</p>	<p>Respondent becoming insane since the marriage.</p>
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FORM 81.

<p>Answer to Petition for Nullity on ground of Bigamy.</p> <p style="padding-left: 40px;"><i>[Commencement as in Form 79, p. 433.]</i></p>	<p>Answer to petition for nullity on ground of bigamy alleging previous marriage.</p>
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- | | |
|---|--|
| <p>1. That he denies that he was on the 10th day of June, 1901, or at any other time, lawfully married to Isabella Isted, as alleged in the said petition.</p> <p>2. That the real name of the said Isabella Isted is Isabella Itteringham, forasmuch as she was, on or about the 10th day of August, 1899, lawfully married to Isaac Itteringham, at the parish church</p> | |
|---|--|

Nullity.

of Blicking, in the county of Norfolk, and that the said Isaac Itteringham is still alive, and is at present residing at Aylsham, in Norfolk aforesaid, and that at the time that the said alleged marriage (if any) took place between the respondent and the said Isabella Itteringham (otherwise Isabella Isted) the said marriage between her and the said Isaac Itteringham was in force and effect, and in nowise annulled, dissolved, or abrogated.

[These paragraphs can easily be altered to fit the case of the wife respondent. Continue and conclude as in Form 79, p. 433.]

Reply and subsequent pleadings.

For the practice as to reply and subsequent pleadings, see ante, pp. 355—361.]

Medical inspectors.

In nullity cases on the ground of impotence medical evidence as to the condition of the parties is necessary.

For the purpose of obtaining this, the solicitor for the petitioner, as soon as the answer is filed or the time for doing so has expired, or no appearance has been entered, should take out a summons for the appointment of medical inspectors for the purpose of examining the parties.

Hearing *in camerâ*.

This summons, among other things, asks that the case may be heard *in camerâ*.

[For form, see title "Practice as to Motions and Summons," p. 511.]

How appointed.

These inspectors are always appointed by the registrar, and neither of the parties has any voice in the matter.

Either party can obtain the appointment of medical inspectors.

Respondent refusing to attend for examination.

If either party refuse to obey the order for medical examination, the other party is not to be thereby prejudiced, and the petitioner will not be prevented from proceeding to trial.

Order for medical inspection must

The order for medical inspection must in every case be made before applying for the registrar's certificate that

the pleadings are in order, for the purpose of setting the cause down. (*See ante*, p. 369.)

If an appearance has been entered, the summons can be served on the opposite party's solicitor, or at the address given for service. If the respondent has not appeared, it is not necessary to serve the summons, but the order and the notice of appointment made upon it must be personally served, or substituted service applied for.

The practice as to obtaining substituted service, affidavits in support, &c., is the same as in the case of substituted service of a citation (*ante*, pp. 304—314), with *this important difference, that in the present case the application is made by summons to a judge in chambers, instead of by motion in open Court.*

The order of appointment is made in the terms of the summons.

The solicitor for the party claiming a decree of nullity is responsible for the medical inspector's fees. From five to ten guineas are generally allowed to each inspector for the examination. Extra fees will of course have to be paid to the inspectors to attend and give evidence in Court, but, as a rule, only one fee will be allowed for this on taxation.

The medical inspectors have to attend before the registrar to be sworn, and the parties have to be identified in their presence.

The solicitor for the party claiming a decree of nullity fixes the day for the swearing of the inspectors and identification of the parties, and gives notice of the appointment to the Divorce Registry. He then prepares the oath for the medical inspectors and minute of identification of the parties, forms of which can be obtained at the Divorce Registry, *Room 43.*

Nullity.

be made before applying for registrar's certificate.

Summons for inspectors, order, notice of appointment; service of.

Substituted service; mode of applying for.

Appointment made in terms of summons.

Solicitor to party claiming decree of nullity responsible for medical inspector's fees.

Swearing inspectors and identification of parties.

Ibid. appointment for.

Nullity.

Oath of
inspectors,
form of.

FORM 82.

**Oath to Medical Inspectors in a Suit for Nullity on the
ground of Impotence.**

B. (otherwise K.) *v.* K.

F. S. and A. F. You are produced as inspectors in a cause depending in the Probate, Divorce and Admiralty Division of His Majesty's High Court of Justice, entitled B., otherwise K. *v.* K., to examine and inspect the parts and organs of generation of B., otherwise K., the petitioner in this cause, and also of K., the respondent in this cause. You respectively swear that you will faithfully and to the best of your skill inspect and examine the parts and organs of generation of each of them the said B., otherwise K., and K., and make a just and true report in writing whether the said B., otherwise K., is or is not a virgin, and whether she hath or hath not any impediment on her part to the consummation of marriage, and whether such impediment (if any) can be cured by art or skill; and also whether the said K. is capable of performing the act of generation, and (if incapable) whether such his incapacity can be cured by art or skill; and that one of you will deliver such report under your hands and seals, closely sealed up, to one of the registrars of the said Division.

Sworn at the Divorce Registry,	}	X. Y., Registrar.
Somerset House, Strand, in		
the County of Middlesex.		

FORM 83.

Minute of
swearing in-
spectors, and
identification
of parties.

**Minute of Medical Inspectors being Sworn, and of
Identification in a Suit for Nullity on the ground
of Impotence.**

B. (otherwise K.) *v.* K.

On , the day of , 19 , before the
undersigned registrar of the said Division:

Personally appeared F. S., of _____, in the county of _____, doctor of medicine, and A. F., of _____, in the county of _____, surgeon, who were respectively appointed by order of _____ made herein, and dated the _____ day of _____, 19____, as inspectors to inspect and examine the parts and organs of generation of B., otherwise K., the petitioner in this cause, and also of K., the respondent in this cause; and to report in writing whether the said B., otherwise K., is or is not a virgin, and whether she hath or hath not any impediment on her part to prevent the consummation of marriage, and whether such impediment (if any) can be cured by art or skill; and also whether the said K. is capable of performing the act of generation, and (if incapable) whether such his incapacity can be cured by art or skill; and who were respectively duly sworn to inspect and examine accordingly.

Nullity.

Minute of swearing in-
spectors, and
identification
of parties.

Then appeared personally the said B., otherwise K., the petitioner, who in the presence of the said inspectors and of the said registrar and of the respondent, acknowledged herself to be the petitioner or party proceeding in this cause.

Then appeared personally also the said K., the respondent, who in the presence of the said inspectors and of the said registrar and of the petitioner, acknowledged himself to be the respondent or party proceeded against in this cause.

X. Y., Registrar.

The registrar swears the inspectors in the above form word by word, but they do not sign the oath. Each party is then identified by the solicitors in the presence of the registrar and the inspectors. The solicitors for both parties must attend the identification of each, and, though it is not necessary, they are generally identified on the same day to avoid inconvenience to the solicitors and inspectors. But whether they attend on the same day or

Ibid.
proceedings
before
registrar.

Nullity. not, the parties are always identified separately and apart, so that they may not be compelled to meet each other unnecessarily.

Parties identified separately.

Medical examination of parties.

The medical inspectors make the appointment for the examination of each of the parties, which takes place at the registry, at the house of one of the inspectors, or at some other convenient place.

In cases of nullity on the ground of impotency, when the respondent has not appeared to the citation or before the medical inspectors, an affidavit of service by the clerk who served the order for medical inspection, and the notice of the appointment thereunder, will be required before the registrar's certificate is granted.

Report of medical inspectors.

The inspectors make and sign their report, which is brought into the Divorce Registry, and left with one of the registrars, who opens it and signs a minute drawn in the registry, after which it is filed, and can then be inspected by either party, who can bespeak an office copy of it.

Parties residing in the country.

If the parties reside in the country and do not desire to come up to London, the registrar will appoint local medical inspectors. The oath and minute of identification are then prepared in London and sent down to the District Probate Registry. The district registrar then carries on the proceedings as above, and receives the report of the inspectors, which he at once forwards by post to the Divorce Registry.

Proceedings after appointment of district registrar referred to district registry.

Respondent out of the jurisdiction.

Sometimes when the respondent is out of the jurisdiction, the registrar will appoint local inspectors, and send the proceedings to the proper official of the local Court to make arrangements for the identification and examination of such respondent on the spot.

FEEES.

	£	s.	d.	Nullity. Fees.
Filing oath	0	2	6	
„ minute of identification	0	2	6	
„ report	0	2	6	
„ minute of registrar	0	2	6	
„ copy report (per folio)	0	0	4	
[The following costs may possibly be allowed on taxation:]				Costs possibly allowed.
Drawing summons for appointment of medical inspectors	0	5	0	
Attending issuing	0	6	8	
Service	0	3	6	
Attending summons	0	6	8	
Attending Dr. — obtaining his consent to act	0	6	8	
Attending Dr. — obtaining his consent to act	0	6	8	
Writing petitioner	0	6	8	
Drawing oath	0	6	8	
Filing registrar's minute	0	6	8	
Attending registry obtaining appointment	0	6	8	
Notice thereof to inspectors	0	3	6	
Attending meeting.	0	6	8	
Filing report and ordering copy	0	6	8	
[And all fees paid out of pocket as above; see also post, pp. 540—637.]				

Where the examination takes place in the country, the district registrar, for acting as commissioner for the principal registrar, is allowed a fee of three guineas. Examination in the country.

[For practice as to setting down cause, and hearing or trial, see ante, pp. 368—388.] Setting down cause, hearing or trial.

By virtue of the provisions of the Matrimonial Causes Act, 1873 (36 & 37 Vict. c. 31), s. 1, a decree in a suit for nullity of marriage is made a decree *nisi* in the first instance. (See post, p. 488.) Decree for nullity, decree nisi in the first instance.

DAMAGES.**Practice as to Damages.**

[See *Part I., Chap. VII.*, ante, pp. 133—138; and as to necessity of damages being assessed by a jury in every case, ante, pp. 368, 377—389.]

Disposition
of damages.
Mat. C. Act,
1857 (20 & 21
Vict. c. 85),
s. 33.

By sect. 33 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), “ . . . after the verdict has been given, the Court shall have power to direct in what manner such damages shall be paid or applied, and to direct that the whole or any part thereof shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife.”

Ibid. petition
limited to
damages
only.

By the earlier part of the same section, a husband whose wife has committed adultery is empowered to file a petition limited to claiming damages only against the adulterer, without asking for any other sort of relief.

Since the coming in force of the Matrimonial Causes Act, 1857, such petitions have been exceedingly rare, and are now almost unheard of, so that they are scarcely worth consideration.

Ibid. form of.

If, however, it should be desired to file a petition of this kind, it will be only necessary to follow Form 5, ante, p. 295, and to conclude with the following form of prayer, which omits all reference to any specific relief, the claim for “such other and further relief as may be meet” being inserted merely to cover any application as to costs.

FORM 84.

Prayer of
petition
limited to
damages
only.

Prayer of Petition limited to only claiming Damages from the Adulterer under Mat. C. Act, 1857, s. 33.

Your petitioner therefore humbly prays—

“That your Lordship will be pleased to ascertain by the verdict of a jury the amount of damages to be paid by the said Robert Marshland, and to

direct how such damages may be applied, and that your petitioner may have such other and further relief as may be meet."

Damages.

(Signed) TIMOTHY TROWSE.

[*The practice on such a petition would be the same as in a suit for dissolution, ante, pp. 285—390.*] Practice on such petition.

In suits for dissolution, if the Court does not decide at the hearing in what way the damages should be applied, it usually makes an order that the amount awarded be paid into Court within a certain time, which is fixed according to the circumstances of the case. Fourteen days in ordinary cases is often fixed.

Disposition of damages.
Exercise of discretion by Court;
practice as to.

The petitioner then takes out a summons before the judge in chambers asking the Court to decide in what way the damages are to be applied.

Summons before judge.

If the usual order is made for the damages to be paid into Court within fourteen days, it is very difficult to enforce the payment of the damages, but a petitioner may apply for the damages to be paid to him personally (*a*) instead of into Court. If this be done the petitioner is then enabled to sue the co-respondent for the amount of the damages (*b*).

[See "*Practice as to Motions and Summonses*," pp. 511—524.]

The petitioner generally lays before the judge in chambers his view as to the disposition of the damages, which should be stated in the summons.

[*For the views generally taken by the Court as to the disposition of the damages, see ante, p. 135 et seq.*]

Disposition of damages,
views of Court as to.

For the manner in which the payment of damages is enforced, see post, title "Practice as to Enforcing Decrees and Orders," p. 638.

Enforcing payment of damages.

For fees and costs, see post, pp. 540—603.]

(*a*) *Pritchard v. Pritchard and Dean* (1870), L. R. 2 P. & D. 53; 39 L. J. P. 46; 22 L. T. 629; *Patterson v. Patterson and Graham* (1870), L. R. 2 P. & D. 189.

(*b*) *Ex parte Fryer, In re Fryer* (1886), 17 Q. B. D. 718; 55 L. J. (Q. B.) 478; 55 L. T. 276.

**CUSTODY
AND ACCESS.**

Practice as to Custody of and Access to Children.

Practice as to.

[*See on this subject Part I., Chap. VIII., ante, pp. 139—147.*]

Custody not
prayed for in
petition.

Separate
petition must
be filed.

If the custody of the children of the marriage is not prayed for in the petition (*see ante, pp. 145—147*), it is necessary to file a separate petition for that purpose, which must be filed and served in the same way as an ordinary petition (*ante, p. 306*). It must, however, be remembered that the father has the common law right to the custody of his children, and there is therefore no necessity to ask for custody in a husband's petition; indeed, it is better not to do so, because then he is not hampered should he wish to take the children out of the jurisdiction of the Court.

Order for
custody when
asked for at
hearing.

Where the custody of the children is asked for at the hearing, the order for such custody forms part of the decree.

Interim
orders,
applications
for.

[*As to the powers of the Court to grant interim orders for custody of children, see ante, pp. 139, 140.*]

By rule 104, "Before the trial or hearing of a cause a husband or wife who are parties to it may apply for an order with respect to the custody, maintenance, or education of or for access to children, issue of their marriage, to the Judge Ordinary, by motion founded on affidavit."

For custody
now heard on
summons by
judge in
chambers.

Although no fresh rule on the subject has ever been promulgated, except rule 212, which applies to "access" only, it has been for many years the practice to hear these applications on a summons before a judge in chambers, instead of on motion in open Court. But such applications are *not* heard before a registrar in the first instance.

And by rule 212, "Application on behalf of a husband or wife, parties to a cause, for access to the children of their marriage may hereafter be made by summons before one of the registrars, who shall direct such order to issue as he thinks fit, subject to appeal to the Court by either party dissatisfied with the order as authorized by rule 184."

Custody and Access.

For access on summons by registrar in first instance.

A summons for an interim order as to custody or access may be taken out by the petitioner at any time after service of the citation, or by the respondent at any time after entering an appearance. Notice must be given to the opposite party.

Time for taking out summons.

The order in terms prohibits the person to whom the custody of the children is given from removing them outside the jurisdiction of the Court. A copy of the order signed by the judge must be served on any person or persons who may happen to have the custody of the children at the time such order is made.

Children must not be moved out of jurisdiction of Court,

If it is desired to remove the children out of the jurisdiction of the Court, application must be made to a judge on summons for leave to do so.

except by leave of a judge obtained on summons.

[*For the practice as to summons, see post, title "Practice as to Motions and Summonses," p. 511.*]

By rule 195, "Rules from 97 to 102, both inclusive, of the rules and regulations for this Court, bearing date 26th December, 1865, shall, so far as the same are applicable, be observed in respect to applications by petition, after a final decree in a cause for orders and provision with respect to the custody, maintenance, and education of children, the marriage of whose parents was the subject of the decree, under the authority given to the Court by 22 & 23 Vict. c. 61, s. 4."

Applications after final decree under Mat. C. Act, 1859.

[*For the powers of the Court under the above section (Mat. C. Act, 1859), see ante, p. 139; and for rules 97—102, see title "Practice as to Alimony and Maintenance," p. 446.*]

**ALIMONY
AND MAIN-
TENANCE.**

Practice as to Alimony and Maintenance.

Powers of
Court.

Alimony
pendente lite.

Permanent
alimony and
maintenance.

Restraining
husband from
parting with
property.

Practice since
1857.

“Main-
tenance.”

“Alimony.”

Rules of
Court.

Distinction
between
dissolution
and other
suits.

Divorce
rules.

Time to
apply for.

[*The subject of alimony and maintenance is treated ante, Part I., Chap. IX., pp. 148—168.*

For the powers of the Court generally, see ante, pp. 148—158; for principles as to alimony pendente lite, see pp. 148—158; as to permanent alimony and maintenance, see pp. 158—168; and for grounds on which Court restrains husband from parting with his property before order made, see pp. 165, 166.]

Applications to the Court for alimony *pendente lite* are regulated by the rules and regulations of the Divorce Court, 81 to 94 inclusive, and 189 to 192 inclusive.

The word “*maintenance*” is used when the permanent provision for a wife after a decree of dissolution is intended; the expression “*permanent alimony*” means the permanent provision for the wife in all other suits.

The practice as to “*permanent alimony*” and “*maintenance*” is regulated by rules 84—88, 91—103, 189—192, and 214—218.

It must be borne in mind that in allotting alimony in suits for dissolution, the Court is guided by its own practice made by virtue of the powers conferred upon it by the Divorce Acts. In other suits it is still bound by the practice of the Ecclesiastical Courts. (*See ante, pp. 150, 151.*)

The latter rules were made some years later than the former, and vary or modify the practice under them to a considerable extent.

By rule 81, “The wife, being the petitioner in a cause, may file her petition for alimony pending suit at any time after the citation has been duly served on the husband, or after order made by the Judge Ordinary to dispense with

such service, provided the factum of marriage between the parties is established by affidavit previously filed.”

Alimony and Maintenance.

And by rule 82, “The wife, being the respondent in a cause, after having entered an appearance, may also file her petition for alimony pending suit.”

The following forms for alimony will be found useful as precedents for petitions both for alimony *pendente lite* and permanent:—

Petitions for alimony, forms of.

FORM 85.

Petition for Alimony *pendente lite*, or Permanent Alimony (1).

Simple form of both *pendente lite* and permanent.

In the High Court of Justice,
Probate, Divorce and Admiralty Division.

(Divorce.)

TROWSE (Charlotte)

v.

TROWSE (Timothy).

Or,

Between Charlotte TROWSE, petitioner,
and

Timothy TROWSE, respondent.

The 14th day of August, 1911.

The petition of Charlotte Trowse, of The Loke Cottage, St. Mary-in-the-Marsh, in the county of Suffolk, the lawful wife of Timothy Trowse, and the respondent in the above cause, sheweth—

1. That the said Timothy Trowse does now carry on and has for many years past carried on the business of a smack owner and fish buyer, at Yarmouth, in the county of Norfolk, and from such business he derives the net annual income of £ .
2. That the said Timothy Trowse is now or lately was possessed of or entitled to proprietary shares of the railway company, amounting in value

Alimony and Maintenance.*Ibid.*

to £ , and yielding a clear annual dividend
of £ .

3. That the said Timothy Trowse is possessed of certain stock-in-trade in his said business of a of the value of £ .

[In same manner state particulars of any other property which the husband may possess.]

Your petitioner therefore humbly prays—

That your Lordship will be pleased to decree her such sum or sums of money by way of alimony *pendente lite* (or permanent alimony) as to your Lordship shall seem meet.

FORM 86.

Ibid. giving fuller details of income.

Petition for Alimony *pendente lite*, or Permanent Alimony (2).

[Commence as in Form 85, substituting the initials A. B. v. C. B. for Trowse v. Trowse.]

1. That the said A. B. has for many years carried on the business or profession of a music-hall artiste, and from such business or profession derives the net annual income of £5,000 or thereabouts.
2. That one E. F. and divers other persons are indebted to the said A. B. in several sums of money, amounting in the whole to £3,000 or thereabouts.
3. That the said A. B. possesses policies of assurance effected by him on his own life, or on the life of the said E. F., and that the present marketable value of such policies is £3,000 or thereabouts.
4. That the said A. B. has, or had prior to the commencement of this suit, plate, pictures, furniture, books, jewellery, professional costumes, and other chattels and effects, at his residence, No. 562, Hyde Park Square, W., and that the said property is of the value of £1,500 or thereabouts.

5. That the said A. B. is possessed of other valuable property, consisting of shares, debentures, or other stock of railway, insurance, or other companies, and in the public funds of Great Britain, and elsewhere, and in bonds, bills, notes, other securities, and in cash standing to his account at the Bank, but the exact value of such property is at present unknown to your petitioner.

Alimony and Maintenance.

Petition for, form of.

6. That the said A. B. holds the said premises situated at No. 562, Hyde Park Square, W., aforesaid, on a lease of sixty years, more or less, at a ground rent of £40 per annum, and that he has at considerable expense effected extensive repairs and improvements upon the said premises, and that the value of the said lease of the said premises is thereby greatly increased, and amounts to the sum of £3,000 or thereabouts.

(Signed) C. B.

By rule 88, "A copy of every petition for alimony, answer and reply, must be delivered to the opposite party, or to his or her proctor, solicitor, or attorney, on the day the same is filed."

Service of petition for alimony; answer and reply.

A plain copy is sufficient. If the opposite party is appearing by a solicitor, the copy is left at such solicitor's office; if in person, then at the address given for service.

But in the case of a petition, rule 88 only applies to cases where the husband has entered an appearance. If he has not appeared the petition for alimony must be personally served, or leave for substituted service obtained.

[*Practice same as in obtaining leave for substituted service of citation, see ante, pp. 308—314.*]

By rule 84, "The husband shall, within eight days after the filing and delivery of a petition for alimony, file his answer thereto upon oath."

Answer, form of.

The husband's answer must therefore be drawn in the form of an affidavit.

Alimony and Maintenance.

And by rule 85, "The husband, being respondent in the cause, must enter an appearance before he can file an answer to a petition for alimony."

Entering appearance by husband.

This appearance must be entered within the eight days allowed for filing the answer.

The husband can, if he pleases, enter an appearance to the petition for alimony only, instead of entering it to the original petition in the suit, in which case he can only be heard on the questions relating to alimony, but cannot file an answer to or be heard on any of the charges in the original petition.

[*For practice as to appearance, see ante, pp. 337—341.*]

The husband should in his answer state what his income has been during the three years prior to the commencement of the suit. But he may state any facts, from which the Court may draw conclusions as to his present income: *Williams v. Williams* (1867), L. R. 1 P. & D. 370; 36 L. J. P. 39; 15 L. T. 249; see also *Nokes v. Nokes* (1863), 3 S. & T. 529; 33 L. J. P. 24; *Crampton v. Crampton and Armstrong* (1863), 32 L. J. P. 142; and a case in the very early days of the Divorce Court, *Kelly v. Kelly*, 1 Ecc. & Ad. 412.

FORM 87.

Answer to Petition for Alimony, as in Form 85.

[*Heading as in Form 85.*]

Answer to Form 85.

The answer of the above-named respondent to the petition for alimony *pendente lite* filed herein by the above-named petitioner.

I, Timothy Trowse, of 125, King Edward's Hill, Yarmouth, in the county of Norfolk, Smackowner, make oath and say as follows:—

1. In answer to the 1st paragraph of the said petition, I admit that I do carry on and have for years past carried on the business of a Smackowner and Fishbuyer, at Yarmouth, aforesaid, as in the said 1st paragraph alleged, but I say that I derive from

the said business the gross annual income of £
and no more, and that such gross annual income is
subject to the following annual deductions neces-
sarily incurred in and about acquiring the said
income, that is to say, £ for rent, £
for gas, &c., &c. (*according to the facts*):

**Alimony and
Maintenance.**

Answer to
Form 85.

2. In answer to the 2nd paragraph of the said petition,
I admit that I am possessed of the said shares in
the 2nd paragraph mentioned, but I deny that they
yield a clear annual dividend of £ or any
annual dividend whatever, the same being now of
no value:
3. In answer to the 3rd paragraph of the said petition,
I say that the stock-in-trade in my said business,
of which I am possessed, is of the value of £ ,
and not of the value of £ as in the said
3rd paragraph alleged:
4. I say that I have no other property or source of
income whatsoever than as is in this my answer
above set out:
5. I say that my said wife Charlotte Trowse is possessed
of or entitled to

[*Here state any separate property to which the
wife may be entitled.*]

Sworn, &c.

(Signed) TIMOTHY TROWSE.

FORM 88.

Answer to Petition for Alimony, as in Form 86.

Answer to
Form 86.

[*Commence as in Form 87.*]

1. I admit that I carry on the business or profession of
a music-hall artiste, as alleged in paragraph 1 of
the said petition, but I say that the gross annual
income I derive therefrom (computed on an average
of my last three years' salaries) does not exceed

Alimony and
Maintenance.*Ibid.*

£1,200, and the expenses attendant on carrying on my said business or profession amount annually to £461 or thereabouts. Full particulars of such expenses are set forth in the 1st schedule hereto.

2. I admit that the said E. F. and one other person are indebted to me as alleged in paragraph 2 of the said petition, but such debts amount to £865 and no more, as set forth in the second schedule hereto, but I say with respect to £200, part of the said gross sum of £865, the same is due to me from one G. H. for money won at cards, and is not recoverable by me from the said G. H. either in law or equity. Except as above, no person is at present indebted to me in any sum or sums whatever.
3. I am not possessed of any policy or policies of assurance, as alleged in paragraph 3 of the said petition.
4. I admit that I have now in my possession divers articles of plate, pictures, furniture, books, jewellery, professional costumes, and other chattels and effects at my residence, No. 562, Hyde Park Square, W., as alleged in paragraph 4 of the said petition, but I say that the same amount in value to the sum of £850 and no more.
5. I admit that I am possessed of other property, as alleged in paragraph 5 of the said petition, but the gross value of such property amounts at the present time to £805 14s. 6d. and no more. Full particulars of such property are set forth in the 3rd schedule hereto.
6. I admit that I hold the premises situated No. 562, Hyde Park Square aforesaid, on a lease as alleged in paragraph 6 of the said petition, but I say there are only four years thereof unexpired, and that I have not made any extensive repairs or improvements in the said premises as alleged in the said paragraph 6 of the said petition, and, on the con-

trary, I verily believe that when the said lease expires I shall have to pay a large sum in respect of dilapidations thereto, and I verily believe the said lease to be of no value.

Alimony and Maintenance.

Answer to Form 86.

7. The petitioner, when she left her home, took with her the sum of £100 in cash, and a quantity of plate, jewellery, and other articles (such cash, plate, jewellery, and other articles being my property), all of which she refuses to return, and declines to render me any account of the same.
8. The petitioner, under the will of her father, J. D., deceased, late of , in the county of , derives for her sole and separate use a net annual income of £250 or thereabouts.

[Conclude as in Form 87.]

(Signed) A. B.

SCHEDULE I.

Schedule to answer to Form 86.

	£	s.	d.
Gross annual income	1,200	0	0

Deductions.

Expenses of keep of a brougham and two horses engaged entirely in driving the respondent about to fulfil his professional engagements at music halls and other places	176	0	0
Coachman's wages at the rate of £1 per week	52	0	0
Coachman's board wages at the rate of 12s. 6d. per week	32	10	0
Wages and keep of manservant or valet, who also acts as dresser	84	10	0
Professional costumes (per annum, taken on an average of three years).	40	6	8
	£385	6	8

Net annual income	£814	13	4
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Alimony and
Maintenance.*Ibid.*

SCHEDULE II.

*List of persons indebted to the respondent,
and the amount of their respective
debts:—*

	£	s.	d.
E. F.	665	0	0
G. H.	200	0	0
	<hr/>		
	£865	0	0
	<hr/>		

SCHEDULE III.

*List of property mentioned in paragraph 5
of respondent's answer:—*

£500 X. Y. Z. Railway stock (present value £106)	530	0	0
1,000 G. W. T. Mine £1 stock fully paid up (present value 2s. 6d.)	125	0	0
1,000 R. V. Mine £1 stock fully paid up (present value 6d.)	25	0	0
Balance at the Bank	125	14	6
	<hr/>		
	£805	14	6
	<hr/>		

Service of
answer.

[For service of answer, see rule 88, ante, p. 449.]

If a husband fails to answer, he cannot cross-examine the wife's witnesses, or call evidence to contradict them: *Constable v. Constable* (1869), L. R. 2 P. & D. 17; 39 L. J. P. 17; 21 L. T. 401.

Wife may
apply to
registrar for
further and
fuller answer.

By rule 86, "The wife, if not satisfied with the husband's answer, may object to the same as insufficient, and apply to the Judge Ordinary on motion to order him to give a further and fuller answer, or to order his attendance on the hearing of the petition for the purpose of being examined thereon." (See also rule 191, post, p. 457.)

And by rule 189, "Application for an order for a further and fuller answer to a petition for alimony, heretofore made to the Judge Ordinary on motion in pursuance

of rule 86, shall hereafter be made by summons before one of the registrars.”

Alimony and Maintenance.

[*These two rules must of course be read together.*]

A registrar may order inspection of a ledger relating to partnership accounts of respondent: *Carew v. Carew*, (1891) P. 360; 61 L. J. P. 24; 65 L. T. 167. A respondent admitted an income of 3,000*l.* a year, but objected to produce his books on the ground that they would disclose private matters relating to the partnership. Held, that the answer was insufficient, and he must file a further and better answer; but that until such further answer had been filed, he ought not to be compelled to disclose the partnership accounts, or to be cross-examined on them. *Tonge v. Tonge, Anderson and Eykyn*, (1892) P. 51; 61 L. J. P. 87; 67 L. T. 390.

Production of books, &c.
Cross-examination of husband.

By rule 87, “In case the answer of the husband alleges that the wife has property of her own, she may (within eight days) file a reply on oath to that allegation; but the husband is not at liberty to file a rejoinder to such reply without permission of the Judge Ordinary, or of one of the registrars in his absence.”

Reply and subsequent pleadings.

[*Now a registrar in the first instance. Rule 181, ante, p. 284.*]

Otherwise no reply is necessary. The reply must take the shape of an affidavit. The following form is suggested as a precedent:—

Reply must be by affidavit.

FORM 89.

Reply to Form 88.

[*Heading as in Form 86.*]

Reply to Form 88, form of.

I, C. B., of _____, in the county of _____, in reply to the answer of the said A. B. to the petition for alimony filed in this cause, make oath and say as follows:—

1. I admit that when I left home I took with me the sum of £100 in cash, and a quantity of plate, jewellery, and other articles, as alleged in para-

Alimony and Maintenance.*Ibid.*

graph 7 of the said answer, but I say that the said cash, plate, jewellery, and other articles are my personal property, and form part of my separate estate, as shown in the next paragraph.

2. I admit that under the will of my late father I received a legacy amounting to £5,000, and no more, but I say that I lent the whole of such sum of £5,000 to my husband, the said A. B., who has never repaid me any portion of the same, except the sum of £100 in cash and the plate, jewellery, and other articles in the said 7th paragraph mentioned, which were valued at £400, and which I agreed with the said A. B. to accept in part payment of the said principal sum of £5,000.
3. I further say that my whole separate estate consists of the said sum of £100 in cash, the said plate, jewellery, and other articles, and the balance of £4,500 at present owing to me by my husband, the said A. B., as shown in the last paragraph, and that, except as above, I have now in my possession no sum or sums of money, jewellery, or other property of any sort whatever.

Sworn, &c.

(Signed) C. B.

[*For service of reply, see rule 88, ante, p. 449.*]**Rejoinder.**

It is possible that the husband would desire to file a rejoinder to a reply such as that suggested in the last form, but this he cannot do without leave of a registrar. (*See rule 87, ante, p. 455.*)

Allotment of alimony, how applied for.

By rule 89, "After the husband has filed his answer to the petition for alimony (subject to any order as to costs), or, if no answer is filed, at the expiration of the time allowed for filing an answer, the wife may proceed to examine witnesses in support of her petition, and apply by motion for an allotment of alimony pending suit, notice of the motion, and of the intention to examine witnesses,

being given to the husband, or to his solicitor, four days previously to the motion being heard and the witnesses examined, unless the Judge Ordinary shall dispense with such notice."

Alimony and Maintenance.

Allotment of alimony, how applied for.

By rule 90, "No affidavits can be read or made use of as evidence in support of or in opposition to the averments contained in a petition for alimony, or in an answer to such a petition, or in a reply, except such as may be required by the Judge Ordinary or by one of the registrars."

By rule 191, "All applications for an allotment of alimony pending suit, and for an allotment of permanent alimony heretofore made to the Court by motion in pursuance of rules 89 and 91, shall hereafter be referred to one of the registrars at the principal registry, who shall investigate the averments in the petition for alimony, answer, and reply, in the presence of the parties, their proctors, solicitors, or attorneys, and who, if he think fit, shall be at liberty to require the attendance of the husband for the purpose of being examined or cross-examined, and to take the oral evidence of witnesses, and to require the production of any documents or to call for affidavits, and shall direct such order to issue as he shall think fit, or refer the application, or any question arising out of it, to the Judge Ordinary for his decision."

Ibid.

[See also rule 86, ante, p. 454.]

It has been decided by the Court of Appeal that a wife has not an absolute right to cross-examine the husband, and the registrar is entitled to read the affidavits beforehand, instead of doing so in the presence of the parties. On appeal, affidavits ought not to be filed to show what took place before the registrar; if the Court desires information, it will consult the registrar himself. *Sykes v. Sykes*, (1897) P. 306; 66 L. J. P. 162; 77 L. T. 150.

Position of wife as to cross-examination of husband.

And by rule 192, "Any person heard on the reference as to alimony before one of the registrars, objecting to the order issued under his direction, may (subject to any order

Appeal from registrar to judge in chambers.

Alimony and Maintenance.

as to costs) apply to the Judge Ordinary on summons to rescind or vary the same."

[*These four rules must, of course, be read together.*]

Appointment before registrar, how applied for.

As soon as the pleadings are complete, the wife's solicitor attends at the Divorce Registry (Room 38) and applies for an appointment, by filling up a form which will be supplied him there, and paying a fee of 10s.

Notice of appointment sent from registry to wife's solicitor.

Due notice of the appointment is sent from the Divorce Registry to the wife's solicitor, or to her address for service if she is conducting her case in person.

Form of notice.

The notice states the date and hour of the day on which the registrar will "hear *the solicitors* as to alimony."

Counsel not heard on a first appointment.

It is important to remember that the registrars will not hear counsel at all on a first appointment for allotment of alimony. The question of whether the party employing counsel is willing to bear the expense in any event will not be considered. Counsel will merely be requested to leave the room.

Notice of appointment to opposite party.

Notice of the appointment must be given to the other side one clear day before.

Allotment made on first appointment if possible.

Whenever it is possible to do so, the registrar makes an allotment of alimony at the first appointment—that is to say, on the petition and answer alone. If he considers there are not sufficient materials before him, he can make an order for further answer, or that the husband attend before him to be cross-examined and produce his books, &c. (a). Either party dissatisfied with the registrar's decision can appeal to the judge in chambers. (*See rule 192, ante, p. 457.*)

Practice: where husband has appeared.

[*As to issuing subpoenas for the attendance of witnesses, see post, title "Practice as to Evidence," p. 604.*]

Ibid. where husband has not entered appearance.

Where the husband, after due service, has not entered an appearance either to the original petition in the suit or

(a) Time for attendance must be stated in the order: see *Townend v. Townend* (1906), 93 L. T. 680 (C. A.).

to the petition for alimony *pendente lite*, or even if he has appeared but has not filed an answer, it is usual before proceeding to allotment for the registrar to require an affidavit of service of the petition for alimony and the notice of appointment.

Alimony and Maintenance.

FORM 90.

Affidavit of Service of Petition for Alimony.

In the High Court of Justice,
Probate, Divorce and Admiralty Division.

Affidavit of service of petition for alimony, form of.

(Divorce.)

TROWSE (Charlotte)

v.

TROWSE (Timothy).

Or,

Between Charlotte TROWSE, petitioner,
and

Timothy TROWSE, respondent.

I, J. J., clerk to Messrs. B. & J., of 225, Coleman Street, solicitors for the plaintiff in the above cause, make oath and say as follows:—

That I duly served the petition for alimony dated the 14th day of August, 19 , and filed in the above cause (“on the respondent in person,” *or* “on W. M., the solicitor for the respondent,” *as the case may be*), by leaving with (“her” *or* “him”) a true copy thereof at (“The Loke Cottage, St. Mary-in-the-Marsh, in the county of Suffolk,” *or* “66, Frederick’s Place, Old Jewry, in the City of London”) on the said 14th day of August, 19 .

Sworn, &c.

(Signed) J. J.

In such case the registrar will require some evidence of the husband’s means, other than that of the wife, who ought to be prepared with affidavits from some independent persons, showing the approximate amount of the

Evidence of means in cases where husband has not appeared.

Alimony and Maintenance.

husband's property, the profits of his business, or his salary if an *employé*.

[For the amount usually awarded as alimony *pendente lite*, see ante, pp. 154—157.]

Amount of,
fixed by
consent.

Sometimes the amount of alimony *pendente lite* is fixed by consent, even in undefended suits. In such a case the order is obtained by a consent summons before the registrar.

[See post, title "Practice as to Motions and Summonses," p. 511.]

A wife is always considered innocent in estimating the amount to be allotted to her for alimony *pendente lite*. *Smith v. Smith and Tremsaux* (1863), 4 S. & T. 228; 32 L. J. P. 91; *Crompton v. Crompton and Armstrong* (1863), 32 L. J. P. 142; *Phillips v. Phillips* (1865), 34 L. J. P. 107; *D'Oyley v. D'Oyley and Baldie* (1859), 4 S. & T. 226; 29 L. J. P. 165.]

Court may
direct
payment of
alimony to
wife or to
her trustee.

By the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 24, "In all cases in which the Court shall make any decree or order for alimony, it may direct the same to be paid either to the wife herself or to any trustee on her behalf, to be approved by the Court, and may impose any terms or restrictions which to the Court may seem expedient, and may from time to time appoint a new trustee, if for any reason it shall appear to the Court expedient so to do."

And by rule 94, "Alimony, pending suit, and also permanent alimony, shall be paid to the wife, or to some person or persons to be nominated in writing by her, and approved of by the Court, as trustee or trustees on her behalf."

Authority to
pay to trustee.

If the wife wishes to avail herself of the provisions of this section, she must file an authority in writing in the Divorce Registry, paying a fee of 2s. 6d., which is the regular fee for filing all documents.

The authority should be more or less in the following form:—

Alimony and
Maintenance.

FORM 91.

**Authority to Trustee to receive Alimony *pendente lite*, *Ibid.* form.
on behalf of a Wife.**

[*Heading as in Form 90.*]

I hereby authorize Leonard Langham, of Binham, in the county of Norfolk, to receive from the respondent such alimony *pendente lite* as may be allotted to me by this honourable Court, and I respectfully request that the said Leonard Langham may be duly appointed for that purpose, and that the said respondent be ordered to pay to him such alimony as aforesaid, as trustee on my behalf.

Authority to
trustee to
receive
alimony,
form of.

August 14th, 19 .

CHARLOTTE TROWSE, petitioner.

In the presence of Joseph Jacques,
clerk to Messrs. Brown & Jones,
solicitors, 225, Coleman Street,
E.C.

[*As to appointing the wife's solicitor as trustee to receive alimony pendente lite, see ante, p. 165.*]

It is not absolutely necessary that this authority should be filed before the order for payment is made. The wife may wish to have it paid to herself in the first instance, and change her mind afterwards, in which case she is at liberty to file the above at any time after giving notice of her intention to the other side.

Above autho-
rity may be
filed after
order made
for payment
of alimony.

Alimony is generally ordered to be paid in full. If the husband desires to deduct income tax, he must make special application for leave to do so at the time of allotment, but it is not in the least likely to be granted.

Alimony to
be paid in
full.

The order for payment of alimony is served in the same

Service of
order for

Alimony and Maintenance.

payment of
alimony
pendente lite.
Enforcing
payment of.

way as the documents mentioned in rule 88. (*See ante*, p. 449.)

[*For the mode of enforcing payment of alimony pendente lite, see ante*, p. 158; *and post*, title "*Enforcing Decrees and Orders*," p. 638.]

Applications
to vary order
by increasing
or reducing
amount of
alimony
ordered to
be paid.

By rule 92, "A wife may at any time after alimony has been allotted to her, whether alimony pending suit or permanent alimony, file her petition for an increase of the alimony allotted by reason of the increased faculties of the husband, or the husband may file a petition for a diminution of the alimony allotted by reason of reduced faculties; and the course of proceeding in such cases shall be the same as required by these rules and regulations in respect of the original petition for alimony, and the allotment thereof, so far as the same are applicable."

Practice as to.

In order to prosecute proceedings under this rule it is only necessary to follow the practice laid down in the foregoing pages.

When
payment
commences.
When
payment
ceases.

[Alimony *pendente lite* is payable from the date of the service, not of the return, of the citation (*Nicholson v. Nicholson and Ratcliffe* (1862), 31 L. J. P. 165); and ceases upon a verdict finding the wife guilty of adultery, unless otherwise ordered (*Dunn v. Dunn* (1887), 13 P. D. 91; 57 L. J. P. 58; 59 L. T. 385); but see as to payment pending appeal, *Butler v. Butler and Burnham* (1890), 15 P. D. 13; 59 L. J. P. 11; 62 L. T. 123. In nullity cases alimony *pendente lite* is payable up to decree absolute. *S. (falsely called B.) v. B.* (1884), 9 P. D. 80; 53 L. J. P. 63; see also *Foden v. Foden*, (1894) P. 307; 63 L. J. P. 163; 71 L. T. 279.]

Ibid. in
nullity suits.

Ibid. suits for
judicial
separation.

In suits for judicial separation, alimony *pendente lite* continues payable up to the date of the decree.

[*See further as to when payment of alimony pendente lite ceases, ante*, pp. 152, 153.]

Alimony
in suits
in formâ
pauperis.

There is nothing to prevent alimony being allotted in a suit prosecuted *in formâ pauperis*.

An order for payment of alimony *pendente lite* is drawn up in the registry and signed by the registrar making it. The respondent is ordered to pay, or cause to be paid to the petitioner, alimony pending suit at the rate of £ per annum “to commence from the date of the service of the citation issued in this cause, to wit, on the day of , 19 .” The amount is usually ordered to be paid weekly; but sometimes, for the convenience of both parties, monthly.

Alimony and Maintenance.

Order for payment of alimony, form of.

The expression “permanent alimony” applies only to suits for judicial separation.

Permanent alimony.

[*For the powers of the Court, see ante, pp. 158 et seq.; and for a list of rules regulating the practice with respect to it, see ante, p. 446.*]

Powers of Court;
list of rules.

By rule 91, “A wife who has obtained a final decree of judicial separation in her favour, and has previously thereto filed her petition for alimony pending suit, on such decree being affirmed on appeal to the full Court, or after the expiration of the time for appealing against the decree, if no appeal be then pending, may apply to the Judge Ordinary by motion for an allotment of permanent alimony; provided that she shall, eight days at least before making such application, give notice thereof to the husband, or to his proctor, solicitor, or attorney.”

Permanent.

And by rule 190, “A wife who has obtained a final decree of judicial separation, on such decree being affirmed on appeal, or after the expiration of the time for appealing against the decree if no appeal be then pending, may apply to the Court by petition for an allotment of permanent alimony, though no alimony shall have been allotted to her pending suit, and the rules from 84 to 88, both inclusive, of the rules and regulations for this Court, bearing date 26th December, 1865, relating to petitions for alimony pending suit as varied by these and other additional rules and regulations shall, so far as the same

Alimony and Maintenance.

are applicable, be observed in respect to the proceedings upon such petitions for permanent alimony."

[*These rules (91 and 190) must be read together.*

See also rules 84, 85, 86 and 87, ante, pp. 449, 450, 454—455; rule 88, ante, p. 449; rule 91, supra; and rule 92, ante, p. 462.]

Mode of proceeding on applications for permanent alimony in cases where alimony *pendente lite* has been allotted and the wife does not allege alteration in husband's income.

Where alimony *pendente lite* has been allotted, no petition for permanent alimony is necessary, unless the wife alleges that her husband's income has increased. The wife's solicitor applies in the Divorce Registry for an appointment, as in the case of alimony *pendente lite*, pays a further fee of 10s., and the proceedings continue as in applications for alimony *pendente lite* (ante, pp. 456 et seq.), except that eight days' notice of this appointment must be given to the husband's solicitor, or to the husband himself if he appears in person.

Ibid. where no alimony *pendente lite* has been allotted.

Where no alimony *pendente lite* has been awarded, or where the wife alleges an alteration in the husband's income, she must commence by petition. (*See Forms 85 and 86, ante, pp. 447—448.*)

Practice, same as in alimony *pendente lite*.

[*The petition is served in accordance with rule 88, ante, p. 449; the answer is as in Forms 87 and 88, ante, pp. 450—454; and the whole practice down to allotment and order for payment of permanent alimony is the same as in proceeding for alimony pendente lite, ante, pp. 446—463.*

Amount awarded.

For the amount usually awarded by way of permanent alimony, see ante, pp. 158—162.]

When payment commences.

By rule 93, "Permanent alimony shall, unless otherwise ordered, commence and be computed from the date of the final decree of the Judge Ordinary, or of the full Court on appeal, as the case may be."

Amount arranged by consent.

The amount to be awarded may be agreed between the parties as in proceedings for alimony *pendente lite*. (*See ante, p. 460.*)

If the cause is undefended, the order for payment of permanent alimony is made at once, but in a defended cause it is not made until the time allowed for appealing by sect. 55 of the Mat. C. Act, 1857, that is to say, three months, has expired.

Alimony and Maintenance.

In undefended cause.

In defended cause.

Application may be made to increase or reduce the amount ordered to be paid by way of permanent alimony as in the case of alimony *pendente lite*. (See ante, p. 462.)

Varying order.

[For the manner of enforcing orders for the payment of permanent alimony, see post, title "Enforcing Decrees and Orders," p. 638.]

Enforcing order.

The order for payment of permanent alimony is drawn up in the registry as in the case of an order for payment of alimony *pendente lite*. (See ante, p. 463.) It is more or less in the same form, substituting the words "permanent alimony" for the words "alimony *pendente lite*," and it is usually ordered to be paid quarterly instead of weekly.

Form of order.

FORM 92.

Petition for Increase of Permanent Alimony.

[Commencement as in Form 86.]

A. B. v. C. B.

The petition of A. B., of _____, in the county of _____, lawful wife of C. B., sheweth—

1. That on the _____ day of _____, 19____, your Lordship (or this honourable Court) pronounced a decree of judicial separation between me and the said C. B. on the ground that the said C. B. had been guilty of cruelty towards me.
2. That on the _____ day of _____, 19____, and during the pendency of the said suit, I filed a petition for alimony *pendente lite*, and that on the _____ day of _____, 19____, the said C. B. duly filed his

Alimony and Maintenance.

answer thereto on oath, and thereby admitted that he was possessed of an annual income of £ .

3. That on the day of , 19 , your Lordship (*or* this honourable Court) decreed that the said C. B. should pay to me the sum of £ by monthly instalments as and for alimony *pendente lite*.
4. That on the said day of , at the time of the pronouncing of the said decree of judicial separation in the 1st paragraph above mentioned, your Lordship (*or* this honourable Court) further decreed that the said C. B. should pay to me the sum of £ by monthly instalments as and for permanent alimony.
5. That I am informed and believe that since the pronouncing of the said last-mentioned decree for permanent alimony, the income of the said C. B. has been largely increased, particularly since the death of E. F., an uncle to the said C. B., who died on the day of , 19 , leaving a will under which the said C. B. became entitled to a legacy amounting to £ .
6. That the said will was duly proved in the principal registry of the Probate, Divorce, and Admiralty Division of her Majesty's High Court of Justice (*or* in the principal Probate Registry of this honourable Court), and that I am informed and believe that the said C. B. has since received and still holds and enjoys the said legacy and the annual income derived therefrom.

Your petitioner therefore humbly prays—

That your Lordship will be pleased to decree to her such an increased sum of money for permanent alimony as to your Lordship may seem meet, and that your petitioner may have such further and other relief in the premises as is meet.

Or,
That your Lordship will be pleased to decree
her—

Alimony and
Maintenance.

1. Such further amount of permanent alimony as may be meet.
2. Such further and other relief as is meet.

(Signed) A. B.

[*As to permanent maintenance, see ante, pp. 161—168.*]

Permanent
maintenance.

It is usually laid down that the word “maintenance” is only applicable to suits for dissolution, but it may be respectfully doubted whether it is not equally applicable to any provision, either for a wife or husband, that is the creature of statute, as, for example, the provision ordered to be made for a husband out of the property of a guilty wife in suits for judicial separation under sect. 45 of the Mat. C. Act, 1857 (post, p. 468), or in suits for restitution of conjugal rights under sects. 2, 3 and 6 of the Mat. C. Act, 1884 (ante, pp. 84—86, and post, p. 473), as distinguished from permanent alimony in a suit for judicial separation, the power to grant which is more or less inherited from the Ecclesiastical Courts.

Meaning of
term.

By rule 95, “Applications to the Court to exercise the authority given by sects. 32 and 45 of 20 & 21 Vict. c. 85, and by sect. 5 of the 22 & 23 Vict. c. 61, are to be made in a separate petition, which must, unless by leave of the judge, be filed as soon as by the said statutes such applications can be made, or within one month thereafter.”

Applications
for permanent
maintenance
must be made
by petition.

By sect. 32 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), “The Court may, if it shall think fit, on any such decree” (*i.e., for dissolution of marriage*), “order that the husband shall to the satisfaction of the Court secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the

Powers of
Court as to.

Alimony and Maintenance.

ability of the husband, and to the conduct of the parties, it shall deem reasonable,” and it goes on to give the Court power to order a proper deed to be prepared by one of the conveyancing counsel of the Chancery Division for the purpose of securing the same.

The provisions of this section are extended by the Mat. C. Act, 1866 (29 & 30 Vict. c. 32), to meet the case of a husband who has no property on which the payment of a gross or annual sum can be secured, but nevertheless might be able to make a monthly or weekly payment to his wife during their joint lives.

Ibid.

By sect. 1, “In every such case it shall be lawful for the Court to make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance and support as the Court may think reasonable: Provided always, that if the husband shall afterwards from any cause become unable to make such payments, it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order, wholly or in part, as to the Court may seem fit.”

Reduction of amount.

It would seem from the terms of the above section that though a husband may apply to reduce the amount of payments to be made under it, the wife cannot apply to have such payments increased.

[Proceedings under this section must be commenced by petition.]

Provision for husband out of property of guilty wife in suits for judicial separation.

By sect. 45 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), “In any case in which the Court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made appear to the Court that the wife is entitled to any property, either in possession or reversion, it shall be lawful for the Court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such

property or any part thereof, for the benefit of the innocent party, and of the children of the marriage, or either or any of them.”

Alimony and Maintenance.

[22 & 23 Vict. c. 61 (*Mat. C. Act*, 1859), s. 5, *the other section mentioned in this rule, gives the Court power to vary settlements in suits for nullity, see post, title “Practice as to Variation of Settlements,” p. 480.*]

Varying settlements in nullity suits.

By rule 96, “In cases of application for maintenance under sect. 32 of the 20 & 21 Vict. c. 85, such petition may be filed as soon as a decree *nisi* has been pronounced, but not before.”

Petition, time for filing.

[*This also applies to petitions under 29 & 30 Vict. c. 32, s. 1, supra.*]

The petition may be filed up to within one month after decree absolute, which is the time allowed for appeal against the decree, and even later by leave of a registrar. See *Bradley v. Bradley* (1878), 3 P. D. 47; 47 L. J. P. 53; 39 L. T. 203; *K. v. K.* (otherwise *R.*), (1910) P. 140.

See also ante, pp. 158—160.]

FORM 93.

Petition for Maintenance.

[*Commencement as in Form 85.*]

1. That on the day of , 19 , your Lordship (or this honourable Court) pronounced a decree *nisi* for the dissolution of the marriage of your petitioner with the said Timothy Trowse.

Petition for maintenance, form of.

[*For contents of petition, see Forms 85 and 86.*]

Wherefore your petitioner humbly prays—

That your Lordship will be pleased to order that the said Timothy Trowse shall, to the satisfaction of your Lordship, and in such manner as to your Lordship shall seem meet, secure to your petitioner by way of maintenance during the term of her natural

Alimony and
Maintenance.

life, or for such other term as to your Lordship shall seem meet, such gross or annual sum of money as to your Lordship shall seem meet, and that your petitioner may have such further and other relief in the premises as is meet.

Or,

That your Lordship will be pleased to order her—

1. Such amount of permanent maintenance as to your Lordship is meet:
2. That such maintenance may be secured to your petitioner in such manner as to your Lordship is meet:
3. Such further and other relief as is meet.

(Signed) CHARLOTTE TROWSE.

[If the petitioner had married again before the final order of maintenance, the title of the cause would have to be altered by describing her as "Charlotte Trowse (now the wife of A. B.)."]

No affidavit
in verification
required.

It does not appear from the rules that any affidavit in verification of this petition is required, and it may be taken that such is the case.

Service of
petition.

By rule 97, "A certified copy of such petition, under seal of the Court, shall be personally served on the husband or wife (as the case may be), and on the person or persons who may have any legal or beneficial interest in the property in respect of which the application is made, unless the Judge Ordinary on motion shall direct any other mode of service, or dispense with service of the same on them or either of them."

[Practice as to service generally, service abroad, and substituted service, the same as citation, ante, pp. 301—319.]

Where the husband has not appeared in the suit, he can enter an appearance to this petition; but if he has not appeared at all, it is most probable that an affidavit of service will be required by the registrar before proceeding to allotment.

Alimony and Maintenance.

Husband not appearing.

By rule 98, "The husband or wife (as the case may be), and the other person or persons (if any) who are served with such petition, within fourteen days after service, may file his, her, or their answer on oath to the said petition, and shall on the same day deliver a copy thereof to the opposite party, or to his solicitor."

Answer, time for filing.

[*Service the same as in case of alimony pendente lite, see ante, p. 449. Service that is not personal is in every case regulated by rules 39 and 114, ante, p. 355.*]

By rule 99, "Any person served with the petition, not being a party to the principal cause, must enter an appearance before he or she can file an answer thereto."

Persons not parties served with petition must appear before filing answer.

And by rule 100, "Within fourteen days from the filing the answer, the opposite party may file a reply thereto, and the same period shall be allowed for filing any further pleading by way of rejoinder."

Subsequent pleadings.

By rule 101, "Such pleadings, when completed, shall in the first instance be referred to one of the registrars, who shall investigate the averments therein contained, in the presence of the parties and their solicitors, and who for that purpose shall be at liberty to require the production of any documents referred to in such pleadings, or to call for any affidavits, and shall report in writing to the Court the result of his investigation, and any special circumstances to be taken into consideration with reference to the prayer of the petition."

Allotting alimony by registrar.

And by rule 204, "The registrar to whom pleadings are referred for investigation under rule 101 shall, if he thinks fit, be at liberty to require the attendance of the husband or wife for the purpose of being examined or cross-examined, and to take the oral evidence of witnesses in

Alimony and Maintenance.

the same manner as on a reference for an allotment of alimony."

Practice up
to report of
registrar.

[*These two rules must be read together.*

The proceedings from this point on to the report of the registrar are the same as in alimony pendente lite, or permanent alimony. See ante, pp. 456—461.]

Report of
registrar.

By rule 102, "The report of the registrar shall be filed in the registry by the husband or wife on whose behalf the petition has been filed, who shall give notice thereof to the other parties heard by the registrar; and either of the parties, within fourteen days after such notice has been given, if the Judge Ordinary be then sitting to hear motions, otherwise on the first day appointed for motions after the expiration of fourteen days, may be heard by the Judge Ordinary on motion in objection to the registrar's report, or may apply on motion for a decree or order to confirm the same and to carry out the prayer of the petition."

[*Rule 103 relates to the wife's costs. See post, title "Practice as to Costs," p. 540.]*

The parties may fix the amount of maintenance by consent, as in alimony. (*See ante, pp. 162, 460, 464.*)

Amount fixed
by consent.

Motion to
confirm
report of
registrar.

The registrar's report as to the amount of permanent maintenance must be confirmed on motion in open Court under the above rule. Objections to the report are heard on this motion.

[*For practice, see post, title "Practice as to Motions and Summonses," p. 511.]*

Order cannot
be made
before decree
absolute, but
inquiry may
be held and
report
prepared.

It has been decided by the Court of Appeal, that although a final order for maintenance cannot be made before decree absolute, the registrar need not wait until such decree has been pronounced to hear the petition and prepare his report. *Waterhouse v. Waterhouse*, (1893) P. 284; 62 L. J. P. 115; 69 L. T. 618.

Allowance to
wife guilty

Where the Court orders the husband to make some provision for a wife found guilty of adultery (*ante*, p. 164),

it is usual to refer the matter to the registrar to fix the amount of such allowance, and the decree is not made absolute until the order of the Court is complied with.

Alimony and Maintenance.

of adultery, practice as to.

[*For the manner of enforcing an order for permanent maintenance, see post, title "Enforcing Decrees and Orders," p. 638.*]

Enforcing order for maintenance.

Rules 214 and 215 were made to carry out the provisions as to alimony and maintenance of the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), passed to amend the law as to restitution of conjugal rights, which confers special powers on the Court of making provision for a wife in these suits.

Provision for wife in suits for restitution under Mat. C. Act, 1884.

[*See ante, pp. 84—86.*]

By rule 214, "All applications to the Court to exercise the authority given by sects. 2, 3 and 6 of 47 & 48 Vict. c. 68, are to be made in a petition, which may be filed as soon as by the said statutes such applications can be made, or at any time thereafter." (*Not before the decree is made or before the time has expired for compliance with such decree.*)

Ibid.

And by rule 215, "Rules 97 to 102, both inclusive, and 195 and 204 (*ante, pp. 470—472, and pp. 445, 471*), shall, so far as the same are applicable, be observed in respect to applications by petition to exercise the authority given by the aforesaid sects. 2, 3 and 6 of 47 & 48 Vict. c. 68."

Ibid.

[*Rules 216, 217 and 218 relate entirely to costs, see title "Practice as to Costs," post, p. 540.*]

FEES.

	Fees.		
	£	s.	d.
Filing petition for alimony <i>pendente lite</i> .	0	2	6
<i>Ibid.</i> permanent alimony	0	2	6
<i>Ibid.</i> maintenance	0	2	6
Filing answers (alimony <i>pendente lite</i> , permanent alimony, maintenance), each	0	2	6

Alimony and Maintenance.

Filing replies and subsequent pleadings (alimony <i>pendente lite</i> , permanent alimony, and maintenance), each . . .	£	s.	d.
	0	2	6
Reference to registrar (alimony <i>pendente lite</i> , permanent alimony and maintenance, <i>in the latter case including his report</i>)	10s.	per hour	
Order of registrar in alimony <i>pendente lite</i> and permanent alimony, each . .	0	5	0
Filing report of registrar on permanent maintenance	0	2	6
[The following costs would probably be allowed on taxation:]			

*Alimony pendente lite.*Allowed on taxation.

Instructions for petition	0	6	8
Drawing same	1	0	0
Attending filing	0	6	8
Personal service of petition at Forest Hill, and mileage	0	10	0
Attending respondent's summons for further time to answer, when order made for fourteen days	0	6	8
Perusing respondent's answer to petition for alimony <i>pendente lite</i>	0	6	8
Attending registrar's appointment to fix alimony	0	6	8
Copy and service of appointment on respondent	0	4	0
Attending appointment before registrar to fix alimony <i>pendente lite</i> , when appointment adjourned, as no one attended for the respondent	0	6	8
The same, when order made fixing the alimony at £ a year . . .	0	13	4
Attending to draw up order for alimony <i>pendente lite</i>	0	6	8
Copy and service of order on respondent .	0	3	6

<i>Permanent Alimony and Maintenance.</i>			<u>Alimony and Maintenance.</u>	
	£	s.	d.	Fees.
Instructions for petition	0	6	8	
Drawing and engrossing including copy to file	1	0	0	
Attending petitioner on her signing petition	0	6	8	
Attending filing petition in Divorce Registry and bespeaking copy under seal for service on respondent	0	6	8	
Attending for same	0	6	8	
Personal service of petition on respondent at , and mileage	0	8	0	
Perusing respondent's answer	0	6	8	
Attending obtaining appointment to fix permanent alimony	0	6	8	
Notice of appointment, copy and service	0	4	0	
Attending appointment when amount of respondent's income ascertained, but appointment adjourned for a week	0	13	4	
Attending adjourned hearing before registrar when permanent alimony fixed	0	13	4	
Attending drawing up order	0	6	8	
Copy order for service on respondent	0	1	4	
Service thereof at Peckham and mileage	0	6	0	
Drawing costs and copies (folios 8)	0	8	0	
Attending filing	0	6	8	
Attending taxing	0	6	8	
Attending for order for payment	0	6	8	
Copy and service of order and mileage	0	6	0	
Term fee	1	1	0	

[*And all fees out of pocket. For the costs allowed on motion to confirm registrar's report as to maintenance, see title "Practice as to Motions and Summonses," p. 511. Also bills of costs extracted from Johnson on Costs, 2nd edition, post, pp. 542—568.*]

PROTECTION ORDERS.

Practice as to Protection Orders.

Statutory provisions as to.

[*For the statutory provisions relating to protection orders and cases reported, see ante, Part I., Chap. X., pp. 169—174.*]

Application for, must be supported by affidavit.

By rule 124, "Applications on the part of a wife deserted by her husband for an order to protect her earnings and property, acquired since the commencement of such desertion, shall be made in writing to the Judge Ordinary in chambers, and supported by affidavit."

Contents of such affidavit.

And by rule 197, "In the affidavit in support of an application on the part of a wife deserted by her husband for an order to protect her earnings and property acquired since the commencement of such desertion, the applicant must state whether she has any knowledge of the residence of her husband, and if he is known to be residing within the jurisdiction of the Court, he must be served personally with a summons to show cause why such order should not be made."

Effect of rule 220 on allegations in application for protection order.

Under the provisions of rule 220 (*ante*, p. 288), the husband's residence and the domicile of the parties at the time of the marriage have to be inserted in the application. Of course, "an application" is not "a petition," but an application of this description is in the nature of a petition. Rule 220 commences with the words "*In all proceedings*," which, if they stood alone, would clearly include an application for a protection order. But, on the other hand, the rule concludes with the words "at the time of the institution of the suit." If, instead of concluding with the words "*of the suit*," the sentence had concluded with the words "*of such proceedings*," the meaning would have been clearer than it is as it stands at present.

But as far as protection orders are concerned, they have become almost extinct, in consequence partly, no doubt, of the passing of the "Married Women's Property Acts," but principally owing to the passing of the Summary Jurisdiction (Married Women) Act, 1895; and a discussion of the possible effect of this rule, and (for that matter) a knowledge of the practice with respect to them, is of small practical value.

Protection
Orders.

Seldom
applied for.

The following is suggested as a form of application:—

FORM 94.

Application for Protection Order.

Application
for, form of.

In the High Court of Justice,
Probate, Divorce, and Admiralty Division.
(Divorce.)

The 17th day of August, 19 .

The application of Clara Cringleford, of 2088, Forest Gate, Stratford, in the administrative county of London, sheweth—

1. That the applicant (then Clara Rockland, spinster) was on the 1st day of September, 1900, lawfully married to Cavendish Cringleford, chemist's assistant (whose present address is unknown, but who was last heard of at Baltimore, in the United States of America), at the Church of St. Peter, Mancroft, in the city of Norwich, and that at the time of the said marriage the applicant and her said husband were both domiciled in England.
2. That after her said marriage the applicant lived and cohabited with her said husband at divers places, and at 2088, Forest Gate aforesaid, and that there have been issue of the said marriage three children, the eldest of whom is now ten years old.
3. That on the 1st day of June, 1906, the said Cavendish Cringleford left home, stating that he was going to

**Protection
Orders.***Ibid.*

Canada to better himself, and has ever since deserted the applicant, and though he has from time to time written to her, has never at any time sent her any money to assist in the support of herself and her children, and, though frequently requested to do so, has always refused to return home or to allow her to join him.

4. That the said Cavendish Cringleford has always, since his desertion of the applicant, refused to give her any address except at a post office, although she has frequently written and asked him to do so.
5. That the last letter received by the applicant from the said Cavendish Cringleford reached her on January 1st, 1911, and was headed, "Post Office, Baltimore, U. S. A.," that the applicant replied to the said letter the next day, addressing such reply to "Post Office, Baltimore," as aforesaid, and posted the same with her own hands at the General Post Office, in St. Martin's-le-Grand, but she has never since received any letter from or heard any news of the said Cavendish Cringleford since the said 1st day of January, 1911.
6. That since the desertion of her said husband the applicant has kept a registry office for servants at 2088, Forest Gate aforesaid, whereby she has earned a fair income and acquired the lease of the house and premises at 2088, Forest Gate aforesaid, together with a sum of £200 now deposited in her name in the Post Office Savings Bank.

Prayer.

Wherefore the applicant humbly prays—

That your Lordship will grant her an order for the protection of her earnings and property acquired since the said 1st day of June, 1906, from the said Cavendish Cringleford, and from all creditors and persons claiming under him.

(Signed) CLARA CRINGLEFORD.

The affidavit required by rules 124 and 197 must be sworn by the wife, and should verify the petition paragraph by paragraph; and if the applicant has any letters from her husband, such letters, or copies of them, should be brought into the Divorce Registry.

Protection Orders.

Affidavit in support, form of.

The application and affidavit must be brought into the Divorce Registry and approved by the registrar.

Application and affidavit must be approved by registrar.

The order is drawn in a book kept in the Divorce Registry, but the applicant can have a copy of such order under seal.

Order, how drawn up.

[*For the powers of the Court as to discharging a protection order, see ante, p. 172.*]

By rule 125, "Applications for the discharge of any order made to protect the earnings and property of a wife are to be made to the Judge Ordinary by motion, and supported by affidavit. Notice of such motion, and copies of any affidavit or other document to be read or used in support thereof, must be personally served on the wife eight clear days before the motion is heard."

Dismissing order.

FEES.

	£	s.	d.
Filing application	0	2	6
Filing affidavit	0	2	6
Entering order	0	5	0
Copy order under seal	0	10	0

**VARIATION
OF SETTLE-
MENTS.**

Practice as to Variation of Settlements.

[See generally, on this subject, ante, Part I., Chap. XI., pp. 175—191.]

Powers of
Court.
Practice,
rules as to.

For the statutory powers of the Court, see ante, pp. 175, 176.]

The rules regulating the practice as to variation of settlements, viz., 95—103, 204, 214 and 215, have all been given *in extenso* (ante, title “Practice as to Alimony and Maintenance,” p. 446).

Proceedings
must com-
mence by
petition.

By rule 95 (see ante, p. 467), proceedings to vary settlements must be commenced by petition, for which the following form is suggested as a precedent:—

FORM 95.

Petition for
variation,
form of.

Petition for Variation of Settlement.

In the High Court of Justice,
Probate, Divorce, and Admiralty Division.
(Divorce.)

A. B. v. C. B.

The day of , 19 .

The petition of A. B., the lawful wife of C. B.,
showeth—

1. That on the day of , 19 , your Lordship (*or* this honourable Court) pronounced a decree *nisi* for the dissolution of the marriage of your petitioner with the said C. B.

[If the petition is filed after a decree of nullity of marriage, the above must be altered accordingly.]

2. That by an ante-nuptial (*or* post-nuptial) settlement bearing date the day of , 18 , a copy

whereof is hereto annexed, it was witnessed that certain trustees therein named should stand possessed of the sum of £6,000 five per cent. London and North Western Railway preference stock, and the sum of £10,000 consols, and £8,000 Victoria bonds, upon trust, during the joint lives of the petitioner and the respondent, to pay two-thirds of the interest, dividends, &c. to the petitioner or to such persons as she should direct for her separate use, and the remaining one-third of the interest, dividends, &c. to the respondent for his own use and benefit; and from and after the decease of either of them, to pay the whole of the interest, &c. to the survivor during his or her life; and from or after the decease of the survivor upon trust, for all or any of the children of the said marriage, according to the joint appointment of the petitioner and respondent, or the appointment of the survivor, or in default of appointment, for all the children of the said marriage, who being a son or sons should attain twenty-one, or being a daughter or daughters should attain that age or be married with the consent of their parents or guardians, with an ultimate trust, on failure of children, for the petitioner, if she should survive the respondent, but if not, then for such persons as she should by will appoint; and in default of appointment, in trust for such persons as would be entitled to her personal estate if she had died intestate and had survived the respondent.

Variation of Settlements.

Petition for variation, form of.

[The deed of settlement need not be filed.]

3. That there are six children of the marriage, as set forth in paragraph 2 of the petition filed in this suit, to which your petitioner craves leave to refer.

[Or else repeat so much of paragraph 2 of the petition for dissolution as relates to the issue of the marriage.]

Variation of Settlements.

Petition for variation, form of.

4. That all the said trust funds mentioned in the settlement were the sole property of the petitioner.
5. That the respondent has never given to nor settled upon the petitioner any property.

Wherefore your petitioner humbly prays—

That your Lordship will be pleased to decree that the said settlement may be varied by (*here set out manner in which it is desired that the settlement should be varied*), or in such other manner as to your Lordship may seem meet, and that your petitioner may have such further and other relief in the premises as is meet.

Or,

That your Lordship will be pleased to decree—

1. That such settlement be varied in such manner as is meet.
2. Such other and further relief as is meet.

(Signed) A. B.

No affidavit in support necessary.

Petition sometimes signed by solicitor.

[*The rules do not require this petition to be verified by affidavit.*]

The Court sometimes allows the petition to be signed by the solicitor. *Ross v. Ross* (1882), 7 P. D. 20; 51 L. J. P. 22.

Petition, time for filing.

The petition to vary may be filed and served any time after decree *nisi*, but not before (*as in petitions for maintenance, rule 96, see ante, p. 469*), or within one month after decree absolute.

Notice to respondent when filed before decree absolute.

[But when the petition is filed before decree absolute, the respondent should have notice that the motion to vary will be made after decree absolute. *Lawrence v. Lawrence* (1862), 3 S. & T. 207; 32 L. J. P. 124.]

Service of petition.

Rule 97 (*see ante, p. 470*) requires personal service; or substituted service by leave of the Court on the opposite

party and on all persons having any legal or beneficial interest in the settlement.

Variation of Settlements.

[For practice as to obtaining order for substituted service, see ante, "Citations," pp. 301—315.]

Trustee, when heard.

It was held in *Corrance v. Corrance and Lowe* (Moore intervening) (1868), L. R. 1 P. & D. 495; 37 L. J. P. 44; 18 L. T. 535, that the trustee of a marriage settlement cannot be heard on a petition to vary, but he can be heard in opposition; but in *Vivian v. Vivian*, (1909) P. 57; 78 L. J. P. 36; 100 L. T. 169, that where the trustee having been made a party by the petitioner, was entitled to be heard. The guardian of minor children is the proper person to petition for variation, if petitioner be dead. The executor cannot do so unless also guardian: *Smithe v. Smithe and Roupell* (1868), L. R. 1 P. & D. 587; *Ling v. Ling and Croker* (1865), 4 S. & T. 99; 34 L. J. P. 52; 13 L. T. 251. Service of petition dispensed with where respondent and trustee both uncertificated bankrupts, and notice of application to dispense had been served on the official receiver: *Snelling v. Snelling* (1890), 63 L. T. 263; also *Gordon v. Gordon*, (1905) P. 96; 76 L. J. P. 39; 92 L. T. 476. One trustee resident in England duly served with petition to vary. Co-trustee resident in Australia, Court refused to order substituted service on trustee resident in Australia, but dispensed with service on him altogether, on being satisfied that neither trustee had any beneficial interest in the property. *Taylor v. Taylor* (1892), 66 L. T. 267.

Guardian of minor children.

Service of petition dispensed with.

Trustee resident in Australia, service.

By rule 98 (*see ante*, p. 471), the parties to the principal cause, or any other persons who have been served with the petition for variation, may file an answer thereto.

Answer, time for filing.

[Where a husband filed his petition for variation after obtaining a decree *nisi* for dissolution, but before decree absolute, the Court of Appeal ordered the wife to file her answer within one month after decree absolute, and dismissed an order of the Court below directing her to file her answer before the decree was made absolute. *Constantinidi v. Constantinidi and Lance*, (1904) P. 306; 73 L. J. P. 91; 91 L. T. 273; 20 T. L. R. 573.

Variation of Settlements.

Proceedings
in Chancery
Division.

The Court has no power until decree absolute to hold an inquiry upon a petition for variation of settlements. *Clarke v. Clarke and Lindsay*, (1911) P. 186 (C. A.); 105 L. T. 1.

It is no answer to a petition to vary, that proceedings to obtain an administration of the trusts of the same settlement are pending in the Chancery Division. *Marsh v. Marsh* (1878), 47 L. J. P. 78.]

Respondent
not answer-
ing; affidavit
of service of
petition
necessary.

Where a respondent has not entered an appearance at all, or if, having appeared, such respondent has not filed an answer to the petition for variation of settlements, an affidavit of service of the petition will be required, which will be more or less as in Form 15 (ante, p. 307).

Trustees and
other persons
served must
appear before
filing answer.

By rule 99 (*see ante*, p. 471), trustees or other persons served with the petition for variation, not being parties to the principal cause, must enter an appearance before filing an answer. But it is not necessary that each of such persons should appear separately. If they are all represented by the same solicitor, he can enter one appearance for them all.

Answer,
service of.

A copy of the answer is delivered to the opposite party. (*See rules 39 and 114*, ante, p. 355.)

Reply, time
for filing.

By rule 100 (*see ante*, p. 471), fourteen days is allowed for filing a reply.

Trustees, &c.
filing answer
out of time,
not heard
before
registrar.

Trustees and others not parties to the principal suit may appear and answer, although they may be out of time, without leave. They are allowed to be present at the inquiry before the registrar, that they may hear what it is proposed to do; but they are not allowed to be heard before the motion to confirm comes on in open Court.

Inquiry
before
registrar.

By rule 101 (*see ante*, p. 471), the matter is referred to the registrar, who investigates the whole matter, and on such inquiry the registrar can call for documents or affidavits; and by rule 204 (*see ante*, p. 471), he can also require the attendance of the husband or wife for examination and cross-examination, and take the oral evidence of other witnesses.

If the registrar requires deeds to be produced, it is not necessary to leave the originals in the Divorce Registry. It will suffice to leave copies, which need not be filed.

Variation of Settlements.

Deeds produced ; originals need not be left in the registry.

[The fact of a wife being an adulteress does not bar her right to cross-examine her husband as to his means. *Driffield v. Driffield* (1891), 65 L. T. 795.]

The party filing the petition for variation obtains the appointment for hearing before the registrar in exactly the same way as in alimony, and pays the same fee of 10s. on application. (*See ante*, p. 458.)

Appointment before registrar, how obtained.

If the respondent is not represented at the appointment before the registrar, an affidavit showing that he was duly served with notice of such appointment will be required.

Respondent not appearing before registrar, affidavit of service of notice required.

The proceedings before the registrar are conducted in the same manner as in alimony, and the practice as to the attendance of counsel and solicitors is the same. (*See ante*, pp. 458—462.)

Investigation before registrar.

By rule 102, p. 472, "The report of the registrar shall be filed in the registry by the husband or wife on whose behalf the petition has been filed, who shall give notice thereof to the other parties heard by the registrar; and either of the parties within fourteen days after such notice has been given, if the judge . . . be then sitting to hear motions, otherwise on the first day appointed for motions after the expiration of fourteen days, may be heard by the judge . . . on motion in objection to the registrar's report, or may apply on motion for a decree or order to confirm the same and to carry out the prayer of the petition."

Report of registrar.

[The omission to make the motion within the fourteen days required by rule 102 is not fatal: *Farrington v. Farrington and Schooles* (1886), 11 P. D. 84; 55 L. J. P. 69. The trustee can be heard on this motion on objection to the report, though not before the registrar. *Corrance v. Corrance and Lowe* (Moore intervening) (1868), L. R. 1 P. & D. 495; 37 L. J. P. 44; 18 L. T. 535.

Rule 103 relates to the costs of the wife; see post, title "Practice as to Costs," p. 540. Costs of wife.

Variation of Settlements.

For the practice as to the motion to confirm the report of the registrar, see post, title "Practice as to Motions and Summonses," p. 511.]

Motion to confirm report of registrar. Order for variation.

When the motion comes on before the Court the judge hears the arguments for and against the report, which are often of great length. Not unfrequently the report is referred back to the registrar for further consideration. When the report is finally confirmed by the Court, it is sent back to the registrar to draw up an order carrying out the directions of the Court.

Service of order.

The parties and trustees and the parties affected by the order are usually served with a certified office copy.

Fees.

FEEES.

	£	s.	d.
Filing petition	0	2	6
Reference to registrar including report, per hour	0	10	0
Filing report	0	2	6

Costs.

[The costs allowed on taxation are about the same as in alimony; and see post, pp. 540—603.]

Amending order.

As to amending order for varying a settlement, see *Cavendish v. Cavendish and Rochefoucauld* (1868), 38 L. J. P. 13; 19 L. T. 497; *Gladstone v. Gladstone* (1876), 1 P. D. 442; 45 L. J. P. 82; 35 L. T. 380. And where money has been ordered to be paid to a parent for the benefit of a child, such order should contain the words "as long as it remains in his (or her) custody": *Sykes v. Sykes and Smith* (1870), L. R. 2 P. & D. 163; 39 L. J. P. 52; 23 L. T. 239; see also *Pocock v. Pocock*, 18 L. T. 338.

Money ordered to be paid for benefit of child.

Rules 214, 215.

Rules 214 and 215, see ante, p. 473, relate to applications in suits for restitution of conjugal rights, under sects. 2, 3, 4 and 5 of the Mat. C. Act, 1884, ante, pp. 84 and 85.]

Practice as to Decree and Intervention.

DECREE AND INTER- VENTION.

[See on this subject generally, ante, Part I., Chap. XII., Generally.
pp. 192 to 203.]

For statutory powers of the Court as to, ante, pp. 192, 193, 195, 199 and 200.] Statutory powers of Court as to.

Decrees for dissolution of marriage and nullity of marriage are decrees *nisi* in the first instance (see ante, pp. 194, 195), and made absolute unless cause is successfully shown against them at the end of six months. After these decrees have been made absolute, one month is allowed in which to appeal against them. Decrees *nisi*.
Dissolution of marriage.
Nullity.

Decrees of judicial separation, restitution of conjugal rights, and jactitation of marriage, are final decrees, and take effect immediately from the day on which they are dated. Final decrees ;
judicial separation ;
restitution of conjugal rights ;
jactitation of marriage.

As decrees are all drawn up in the Divorce Registry, and neither the parties nor their counsel or solicitors have any hand either in drafting or settling them, it seems scarcely worth while to burden the text of this book with the forms of such decrees, but the following notes of their contents may be useful. All decrees drawn up in Divorce Registry.

Every decree is headed in the cause, and dated immediately after the heading. It then goes on to recite the fact that, having taken the evidence of the parties themselves (*or, in undefended cases, "of the petitioner"*), and the witnesses produced on their (*or "his" or "her"*) behalf, and heard counsel, the judge is satisfied that the charges contained in the petition have been proved. Decree, formal commencement of.

[After commencing as above, decrees continue as follows:]

1. A decree *nisi* for dissolution decrees that the marriage be dissolved (*setting out the grounds on which such* Dissolution, decree *nisi* for; contents of.

Decree and Intervention.

Dissolution,
decree *nisi*;
contents of.

dissolution is decreed), "unless sufficient cause be shown to the Court why this decree should not be made absolute within six months from the date thereof." The co-respondent (if any) is then formally condemned in the costs "incurred and to be incurred on behalf of the petitioner." If the custody of the children of the marriage has been asked for and granted at the hearing, "it is ordered that *such children* do remain in the custody of the petitioner until further order of the Court, but it is directed that such children be not removed out of the jurisdiction of the Court without its sanction." If the petitioner be the husband, he is further ordered to pay the respondent's taxed costs, up to the sum ordered to be secured to cover the wife's costs of the hearing. If, on the other hand, the petitioner is the wife, the husband will, of course, be formally condemned in her full costs.

Nullity,
decree *nisi*
for; contents
of.

2. A decree *nisi* for nullity of marriage decrees "that the marriage in fact had and solemnized on the day of , 19 , at , in the county of , between A. B. (otherwise C.), the petitioner, and J. B., the respondent, be pronounced and declared to have been and to be absolutely null and void to all intents and purposes in the law whatsoever by reason of (*setting forth the grounds on which such marriage is declared null and void*), and that the said A. B. (otherwise C.) be pronounced to have been and to be free from all bond of marriage with the said J. B., unless sufficient cause be shown to the Court why this decree should not be made absolute within six months from this date:" and the decree concludes by condemning the respondent in the costs "incurred and to be incurred" on behalf of the petitioner.

Judicial
separation,
final decree
for;
contents of.

3. A decree of judicial separation recites that the judge "by his final decree pronounced and decreed a judicial separation between A. B., the petitioner, and C. B., the respondent, by reason of (*setting forth the grounds of such decree*), and condemned the said respondent in the costs incurred and to be incurred on behalf of the said peti-

tioner." If the Court has not given the petitioner the whole of the costs by reason of some of the charges being frivolous or for any other reason, the decree will continue "except such costs," setting forth clearly what portion of the costs has been disallowed.

Decree and Intervention.

4. A decree of restitution of conjugal rights recites "that the judge by his final decree pronounced that the petitioner and respondent were and are lawful husband and wife, and ordered that the said respondent do within fourteen days from the service of this order on him return home to the petitioner, and render her conjugal rights (*or vice versâ*), and (*if a husband*) within a like time file a certificate that he has so done, and condemned the said respondent in the costs incurred and to be incurred on behalf of the said petitioner."

Restitution of conjugal rights, final decree for; form of.

5. In suits for jactitation of marriage, the Court decrees perpetual silence against the respondent, and condemns in his costs. In other words, the respondent is forbidden ever again to allege that he (*or she*) is married to the petitioner.

Jactitation of marriage, final decree for; contents of.

Decrees *nisi* are signed by the registrar. Office copies can be obtained, but the cost of them will not be allowed on taxation, as, being inchoate documents, it is not usually a matter of importance to the petitioner whether he or she possesses one or not.

Decrees *nisi* signed by registrar.

Where a decree *nisi* contains collateral matter, such as an order for the custody of children, paying damages into Court, &c., a plain copy of so much of it as contains such collateral matter, signed by the judge, must be served on the respondent, and, if necessary, on the co-respondent (if any) also. Otherwise decrees *nisi* are not served on the opposite party.

Decrees *nisi*, when service of required.

In final decrees for judicial separation also, if they contain an order for the custody of children, a plain copy of such order must also be served on the opposite party whenever the children have not been given up to the petitioner, but not otherwise.

Final decrees, when service of required.

Decree and Intervention.

Documents handed in at hearing on trial;

Custody of, in defended causes.

Ibid. in undefended causes.

When handed out; copies left in registry. Making decree absolute.

The fee for a plain copy for service as above is 5s.

Documents handed in at the hearing or trial are retained in the registry until the decree is made absolute, unless the Court at the hearing makes some special order with respect to them, which is not unfrequently done on the application of counsel when the circumstances warrant it.

After decree absolute they are given out to the parties who handed them in. But in every defended cause the parties or their solicitors must attend at the Divorce Registry, or if one party, or his or her solicitor, only attend, a letter of consent from the other side must be produced.

In undefended causes they are given out on a proper receipt for them being left in the registry.

In every case such copies must be left in the Divorce Registry as the registrar shall think fit.

By rule 80, "All applications to make absolute a decree *nisi* for dissolution of a marriage must be made to the Court by motion. In support of such applications it must be shown by affidavit filed with the case for motion that search has been made in the proper books at the registry up to within two days of the affidavit being filed, and that at such time no person had obtained leave to intervene in the cause, and that no appearance had been entered nor any affidavits filed on behalf of any person wishing to show cause against the decree *nisi* being made absolute; and in case leave to intervene had been obtained, or appearance entered, or affidavits filed on behalf of any such person, it must be shown by affidavit what proceedings, if any, had been taken thereon, but it shall not be necessary to file a copy of the decree *nisi*."

Practice as to.

By rule 194, "In case application by motion to make absolute a decree *nisi* for the dissolution of a marriage should from any cause be deferred beyond six days from the time when the affidavit required by rule 80 is filed with the case for motion, it must be shown by further affidavit that search has been made in the proper books up

to within six clear days of the motion for decree absolute being heard, and that at such time no person had obtained leave to intervene, and that no appearance had been entered nor any affidavits filed on behalf of any person wishing to show cause against the decree *nisi* being made absolute; and in case leave to intervene had been obtained, or appearance entered or affidavits filed on behalf of any such person, it must also be shown by such further affidavit what proceedings, if any, have been taken thereon.”

Decree and Intervention.

Making decree absolute.

And by rule 207, “Application to make absolute a decree *nisi* for dissolution or nullity of a marriage need not hereafter be made to the Court by motion as directed by rules 80 and 194, but it shall be a sufficient compliance with the said rules to file in the registry, with the affidavit or affidavits therein required, a notice in writing setting forth that application is made for such decree absolute, which will thereupon be pronounced in open Court at a time appointed for that purpose.”

Present practice as to.

[See, on the subject of making decrees absolute, ante, pp. 194, 195.]

Although by rule 207 it is no longer necessary to move to make a decree *nisi* absolute, the provisions of rules 80 and 194 as to making searches and filing affidavits must still be complied with.

The effect of rule 207 has been to remove a very unnecessary tax upon litigants who up to the time that rule came into force, which was about November, 1880, had in every case to brief counsel merely to stand up and ask that the decree be made absolute.

Ibid.

The decree is still made absolute in open Court, though without any motion. On every motion day the registrar reads over a list of causes in which the proper time has elapsed, and the requirements of rules 80 and 194 have been complied with. If any party or other person objects to the decree being made absolute, counsel is instructed

Decree and Intervention.

Making decree absolute, present practice as to.

Custody of pleadings and other documents.

Office copies, when certified.

Sealed copy.

Intervention by the King's Proctor and other interveners.

Application to intervene.

to get up and oppose it when the name of the cause is called.

If the application is not made within twelve months from the date of the decree *nisi*, an affidavit must be filed explaining the delay—want of means may be a sufficient excuse.

By rule 118, "The registrars of the principal registry of the Court of Probate are to have the custody of all pleadings and other documents now or hereafter to be brought in or filed, and of all entries of orders and decrees made in any matter or suit depending in the Court for divorce and matrimonial causes; and all rules and orders, and fees payable in respect of searches for and inspection or copies of and extracts from and attendance with books and documents in the registry of the Court of Probate, shall extend to such pleadings and other documents brought in or filed, and all entries of orders and decrees made in the Court for divorce and matrimonial causes, save that the length of copies and extracts shall in all cases be computed at the rate of seventy-two words per folio."

By rule 119, "Office copies or extracts furnished from the registry of the Court of Probate will not be collated with the originals from which the same are copied, unless specially required. Every copy so required to be examined shall be certified under the hand of one of the principal registrars of the Court of Probate to be an examined copy."

And by rule 120, "The seal of the Court will not be affixed to any copy which is not certified to be an examined copy."

Intervention is of two kinds—by the King's Proctor, or by one of the public. (*See ante*, pp. 195—203.)

Usually the King's Proctor intervenes on information privately communicated, but sometimes he takes action in consequence of papers in a cause being laid before him by order of the Court. (*See ante*, p. 200.)

By rule 23, "Application for leave to intervene in any

cause must be made to the judge by motion, supported by affidavit.” Decree and Intervention.

[No one who is a party to the suit can obtain leave to intervene: *Stoate v. Stoate* (1861), 2 S. & T. 384; 30 L. J. P. 173; 5 L. T. 138. Where a friend of the co-respondent attempted to intervene, but did not bring forward a single fact of importance to the notice of the Court on affidavit, the Court dismissed the application and condemned him in costs. *Forster v. Forster and Berridge* (Graham intervening) (1863), 3 S. & T. 151; 32 L. J. P. 206; 9 L. T. 148.] Party cannot intervene.
Intervention frivolous;
costs.

And by rule 24, “Every party intervening must join in the proceedings at the stage in which he finds them, unless it is otherwise ordered by the judge.” Intervener:
period of
intervention.

By rule 202 (made April 17, 1877), “When the Queen’s (now King’s) Proctor desires to show cause against making absolute a decree *nisi* for dissolution or nullity of marriage, he shall enter an appearance in the cause in which such decree *nisi* has been pronounced, and shall, within fourteen days after entering appearance, file his plea in the registry, setting forth the grounds upon which he desires to show cause as aforesaid, and on the day he files his plea in the registry shall deliver a copy thereof to the person in whose favour such decree has been pronounced, or to his or her solicitor, and all subsequent pleadings and proceedings in respect to such plea shall be filed and carried on in the same manner as directed by the existing Rules and Regulations Nos. 68 and 69, in regard to the plea of the Queen’s (now King’s) Proctor filed after obtaining leave to intervene in a cause, and the existing Rules and Regulations from Nos. 70 to 76, both inclusive, shall no longer be applicable to the Queen’s (now King’s) Proctor on his showing cause as aforesaid, save so far as regards any proceedings already commenced in pursuance of the said Rules and Regulations.” King’s
Proctor can
intervene
without leave.
Plea of.

The above rule was promulgated to take the place of rule 68, in order to prevent the necessity of the King’s

Decree and Intervention.

Proctor having to obtain leave before intervening. All the rest of rule 68 is repeated in rule 202.

[*For practice as to entering appearance, see ante, pp. 337—341.*]

Subsequent pleadings.

And by rule 69, "All subsequent pleadings and proceedings in respect to the Queen's (*now King's*) Proctor's intervention in a cause shall be filed and carried on in the same manner as before directed in respect of the pleadings and proceedings of the original parties to the cause."

[*For practice, see ante, pp. 341—388.*]

"Other interveners" must still obtain leave;

Although rules 70—76 are by rule 202 made no longer applicable to the King's Proctor, they are applicable to other interveners, all of whom have still to obtain leave before intervening.

and must first enter appearance.

By rule 70, "Any person wishing to show cause against making absolute a decree *nisi* for dissolution of marriage shall enter an appearance in the cause in which such decree *nisi* has been pronounced."

[*For practice, see ante, pp. 337—341.*]

May have to give security for costs.

Where a person other than the King's Proctor intervenes against a decree being made absolute, the party who has obtained the decree may apply that such intervener be ordered to give security of costs pending the inquiry.

Affidavits, filing of.

By rule 71, "Every such person shall at the time of entering an appearance, or within four days thereafter, file affidavits setting forth the facts on which he relies."

Service of.

By rule 72, "Upon the same day on which such person files his affidavits he shall deliver a copy of the same to the party in the cause in whose favour the decree *nisi* has been pronounced."

Answer, time for filing.

By rule 73, "The party in the cause in whose favour the decree *nisi* has been pronounced may, within eight days after delivery of the affidavits, file affidavits in answer, and shall, upon the day such affidavits are filed, deliver

a copy thereof to the person showing cause against the decree being made absolute.” Decree and Intervention.

By rule 74, “The person showing cause against the decree *nisi* being made absolute may, within eight days, file affidavits in reply, and shall upon the same day deliver copies thereof to the party supporting the decree *nisi*.” Reply, time for filing.

By rule 75, “No affidavits are to be filed in rejoinder to the affidavits in reply without permission of the judge or of one of the registrars in his absence.” Subsequent pleading.

[*Now before a registrar, ante, p. 284.*]

By rule 76, “The questions raised on such affidavits shall be argued in such manner and at such time as the judge may on application by motion direct; and if he thinks fit to direct any controverted questions of fact to be tried by a jury, the same shall be settled and tried in the same manner and subject to the same rules as any other issue tried in this Court.” Hearing of issues raised on affidavit.

FORM 96.

King's Proctor's Plea.

In the High Court of Justice,
Probate, Divorce, and Admiralty Division.
(Divorce.)

King's
Proctor's
plea, form of.

Between A. B., petitioner, and
C. D., respondent.

King's Proctor showing cause.

Plea of the King's Proctor.

1. That material facts hereinafter mentioned have not been brought to the knowledge of the Court.

[*Here follow the King's Proctor's allegations in numbered paragraphs.*]

The King's Proctor therefore prays the Court to deal with the cause by reversing the decree *nisi* and

Decree and Intervention.

dismissing the petition, and to make such order as to costs as to the Court may seem meet.

Ibid.

The concluding paragraph of the above form was suggested by the late Lord Hannen.

[As to pleading various allegations in the same plea, see *Crawford v. Crawford and Dilke* (Queen's Proctor intervening) (1886), 11 P.D. 150; 55 L.J.P. 42; 55 L.T. 304; *Dering v. Dering and Blakeley* (Queen's Proctor and others intervening) (1868), L.R. 1 P. & D. 531; 37 L.J.P. 52; 19 L.T. 48.]

FORM 97.

Answer to King's Proctor's Plea.

[*Heading as in Form 96.*]

Answer to
King's
Proctor's
plea, form of.

The petitioner A. B., by R. C. T., his solicitor, in answer to the plea of the King's Proctor filed in this cause, saith:—

1. That he denies that material facts have not been brought to the knowledge of the Court as alleged in the said plea.
2. That he denies (*each of the King's Proctor's allegations categorically one by one*).

Or,

“That he denies each and every one of the allegations contained in the said plea.”

The practice of denying each of the allegations, separately one by one, is strongly recommended to pleaders, as being very little more trouble, less slovenly, and in every way more satisfactory than a general denial.

Setting down
cause,
hearing, &c.

[*The King's Proctor obtains the registrar's certificate and sets the cause down for hearing, and the cause is heard or tried as in suits for dissolution. See ante, pp. 368—388.*]

Issues tried
by jury.

If it is desired that the issues should be tried by a jury, application must be made on summons.

If no answer is filed, the King's Proctor moves the Court that the petition be dismissed and the decree rescinded. But he must satisfy the Court on affidavit that he has searched and found that no answer has been made.

Decree and Intervention.

No answer filed, petition dismissed, and decree rescinded.

[See post, title "*Practice as to Motions and Summonses*," pp. 511, 524.]

King's Proctor must give particulars.

The King's Proctor is bound to give particulars (*for practice, see ante, pp. 361—367*) of his charges in the same manner as any ordinary litigant: *Jessop v. Jessop* (1861), 2 S. & T. 301; 30 L. J. P. 193; 4 L. T. 308; *Barnes v. Barnes and Grimwade* (Queen's Proctor intervening) (1867), L. R. 1 P. & D. 505; 37 L. J. P. 4; 17 L. T. 268; see also *Gladstone v. Gladstone* (1875), L. R. 3 P. & D. 260; 44 L. J. P. 46; 32 L. T. 404; *Pierce v. Pierce* (Queen's Proctor showing cause) (1892), 66 L. T. 861.]

The King's Proctor is now condemned in costs whenever the Court deems that his intervention was uncalled for. (Mat. C. Act, 1878 (41 Vict. c. 19), ss. 1, 2.)

Ibid. condemned in costs.

[See p. 246 and cases there quoted on this question.]

Where the Queen's Proctor applied for leave to amend certain dates, he was allowed to do so on payment of costs of amendment: *Tomkins v. Tomkins* (Queen's Proctor intervening) (1872), 20 W. R. 497.]

Ibid. amending plea.

When the intervention is successful the petition is dismissed and the decree rescinded.

Intervention successful; petition dismissed; decree rescinded. Order rescinding decree, form of.

The order rescinding the decree is entirely drawn up in the Divorce Registry and signed by a registrar.

[When a decree *nisi* is rescinded, that part of it condemning the co-respondent in costs falls with it: *Hyman v. Hyman and Goldman* (King's Proctor showing cause), (1904) P. 403; 73 L. J. P. 106; 91 L. T. 361; also *Quartermaine v. Quartermaine and Glenister*, (1911) P. 180; see also *Hechler v. Hechler and Bennett* (1889), 58 L. J. P. 27.]

Fees as in "Dissolution of Marriage," ante, pp. 316, 336, 340, 360, 366 and 367. See also post, title "Practice as to Costs," pp. 540—603.]

Fees. Costs.

LEGITI-
MACY
DECLARA-
TION ACT,
1858.

Practice under the Legitimacy Declaration
Act, 1858.

[For the Act itself, and the cases decided on it, see Part I.,
Chap. XIII., ante, pp. 204—211.]

Petition
must be
supported by
affidavit.

Attorney-
General must
be made
respondent.

Citing parties
to see pro-
ceedings.

Every petition under this Act must be verified by affidavit, which must deny collusion. (*Sect. 3, ante, p. 205.*)

In every case the Attorney-General must be made a respondent. (*Sect. 6, ibid.*)

By sect. 7 (*ante, p. 206*), application may be made to the Court to cite such persons as may be thought necessary.

By rule 174, "The above rules and regulations, so far as the same may be applicable, shall extend to applications and proceedings under the Legitimacy Declaration Act, 1858."

All the D. C.
Rules as far
as possible
applicable
to these
proceedings.

Greek
Marriages
Act, 1884.

Provisions of.

The effect of this rule is that the practice with respect to a suit under the Legitimacy Declaration Act is, with the few necessary exceptions dealt with in the following pages, the same as in an ordinary suit for dissolution.

The Greek Marriages Act, 1884 (47 & 48 Vict. c. 20) (*post, Appendix B.*), which was passed to establish the validity of certain marriages that had taken place in certain Greek Catholic chapels at Finsbury Circus and London Wall, by sect. 1 enables any party to such marriage, or any child or grandchild of such party, or any person interested in the validity of such marriage, to apply to the Divorce Division for a decree declaring that such marriage was a valid marriage.

This statute embodies the Legitimacy Declaration Act, and applies its provisions to the above declarations, and the practice under the two statutes is identical.

Legitimacy
Declaration
Act, 1858.

Practice
identical with
legitimacy
declaration.

The Greek Marriages Act, 1884.

By rule 213, "In pursuance of the provisions of the Act of Parliament 47 & 48 Vict. c. 20, s. 1, whereby it was enacted that any petition to the Probate and Matrimonial Division of her Majesty's High Court of Justice under the said Act should be accompanied by such affidavit verifying the same as the said Court might from time to time direct:

Affidavit in
support of
Greek Mar-
riages Act.

"Now, I, the Right Honourable Sir James Hannen, Knight, the President of the said Division, do hereby direct that the affidavit verifying a petition under the said Act shall be in the form and to the effect required by rule 2 of the rules and regulations for her Majesty's Court for Divorce and Matrimonial Causes, bearing date 26th December, 1865.

"(Signed) JAMES HANNEN.

"Dated 6th August, 1884."

This rule was rendered necessary by the fact that whereas the Legitimacy Declaration Act, 1858, by sect. 3 (ante, p. 205) specially provides that the affidavit verifying the petition shall deny collusion, the Greek Marriages Act, 1884, merely says that the petition shall be supported by an affidavit, but is silent as to denying collusion.

Ibid.
Legitimacy
Declaration
Act.

Copies of the petition and affidavit are delivered to the Attorney-General, and after a month has elapsed they can be filed in the Divorce Registry. It is usual, and indeed only common sense, to give the Attorney-General notice that the petition has been filed, although it is not obligatory to do so. The Attorney-General then enters an appearance, and files his answer within the times already shown. (Ante, pp. 337—353.)

Copy of peti-
tion served on
Attorney-
General.

Time for
filing.

Appearance
and answer
by Attorney-
General.

**Legitimacy
Declaration
Act, 1858.**

The following is taken from the petition and answers in a case under the Legitimacy Declaration Act, 1858, heard about 1860. Had it been heard at the present day, it would have been headed thus:—

Specimen of
pleadings in
suit for
declaration of
legitimacy.

SPECIMEN FORM 98.

**Petition of, and Answers in Suit for Declaration
of Legitimacy.**

In the High Court of Justice,
Probate, Divorce, and Admiralty Division.

(Divorce.)

To the Right Honourable the President of the said
Division.

The day of , 19 .

The petition of W. P. R. S. of , and A. J. S.
of , sheweth:—

New rules,
1904, 1905.

[Apparently rules 219 and 220, ante, pp. 287, 288, can have no application to petitions under the Legitimacy Declaration Act because, though they begin with the words, "In all proceedings before the Court for divorce and matrimonial causes," yet it is clear from the context that they were not intended to apply to these suits. But if one of the parties to a marriage were to file a petition under the Greek Marriages Act, it is submitted it would be necessary that the description and address of the husband and the domicile of the parties at the time of the marriage should be stated somewhere in the petition.]

1. That the petitioners are both natural-born subjects of her Majesty; that W. P. R. S. is the son and heir, and A. J. S. a grandchild of W. S., late of R. county of A. in N. B., but who died at N. Y. in A., whilst living also a natural-born British subject, and that the petitioners are both domiciled in E.
2. That W. S., the father of the elder petitioner, was the son of J. S. of R. and his wife J. S. formerly

R., that J. S. was the owner in fee of the estate called R. and other freehold estates in A., that he died in 1770 aged eighty, leaving the said W. S. his only son and two daughters—M. married to J. P. of F. and A. who died unmarried.

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Ibid.

3. That W. S., who was born and resided in S., left that country *animo revertendi*, and went to V. about the year 1770 for temporary trading purposes; that in consequence of political disturbances which ensued in the N. A. provinces from 1774 to 1783 his return home was delayed; that in 1783 he went to N. Y. to establish certain claims to compensation under the treaty of peace as a British subject who by reason of his loyalty to the B. Crown had suffered losses, and also to wind up his V. affairs; that he always intended to leave N. Y. and return to S. for life as soon as his compensation claim should be settled, but that, in fact, such claims were not settled till 1802.
4. That the said W. S. died at N. Y. on the 13th of November, 1798, aged fifty-one, being then a B. subject, and seised of real estate in S., which had descended to him from his father, and of other real estate which he had acquired.
5. That the said W. S., at the end of the year 1785, intermarried with R. K., who soon after died, and by whom he had an only child, a daughter born in 1786.
6. That the said W. S. whilst residing in the State of N. Y., was in the year 1790, being then a widower, lawfully married to A. W., spinster, that from and after their said marriage the said W. S. and the said A. W., then S., lived and cohabited together as lawful husband and wife, until the death of the said W. S.; that during such time they owned and acknowledged each other to be husband and wife, and as such were accounted, &c. amongst their

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neighbours, friends, acquaintance, and others, and that such marriage was an open and notorious fact.

7. That there was issue of such marriage one daughter, J. R. S., born in the year 1792, and one son, W. P. R. S., the petitioner, born in 1794.
8. That the said W. P. R. S., the petitioner, in the year 1855, brought an action for the recovery of some land at W. in the State of N. Y., of which his father was seised at the time of his death, which action was tried in the State of N. Y. in February, 1855, and that by the verdict and judgment thereon obtained in that action the validity of the said marriage, and consequent legitimacy of the petitioner were established in the State of N. Y., where it was contracted.
9. That W. P. R. S., the petitioner, would have succeeded long since in establishing in G. B. the validity of the said marriage, but for the state of ignorance in which he was purposely kept as to the said marriage and other family matters by various members of his family who were interested in denying his legitimacy, some of whom had the sole care and charge of him during his youth, that he had specially been prevented, &c., by the conduct of R. P., J. P., W. P., hereinafter mentioned, and one H. C., since deceased.
10. That in case of the intestacy of the said W. S. and the illegitimacy of his children, his next of kin at the time of his death, and the persons entitled in distribution to his personal estate, would have been his nephews and nieces, R. P., J. P., and W. P., and J. and E. P., spinsters; but that their claims to any share of his personal estate in distribution were and are barred by his will and codicils, proved by his executors in A. at the time and afterwards proved by the said W. P. R. S. in this country.
11. That in case of the illegitimacy of the children of

the said W. S., his heir-at-law would have been his nephew, R. P., the eldest son of his aforesaid sister M., wife of J. P., of T.; that the said R. P. died about the year 1838, leaving J. S. P. his eldest son and heir-at-law; that the said J. S. P. died about 1844, and that R. S. P., of T. and H., is his eldest son and present heir-at-law.

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Act, 1858.

Ibid.

12. That the said W. P., a Writer to the Signet in E., and who was the guardian of W. P. R. S., the petitioner, is at present in possession of the aforesaid freehold estates in A., or some part thereof, of which the said W. S. died seised.
13. That the said W. P. is the only surviving child of the aforesaid J. P., and there is no child now living of any brother or sister of the said W. P., and, in case of the illegitimacy of W. S.'s children, the said W. P. would be his sole next of kin.
14. Stated the issue of A. B., the eldest daughter of W. S.

Your petitioners therefore humbly pray—

That your Lordships will be pleased to entertain this their application, and allow them to prosecute the necessary proceedings thereupon, and will be pleased to hear and determine the same, and to pronounce (on sufficient evidence being adduced by them or on their behalf) that the said W. S. and A. W. were lawfully married prior to the birth of the first-named petitioner, and his sister, J. R. S., and that your said first-named petitioner, W. P. R. S., is their legitimate son and heir and a natural-born subject of her Majesty, and that all proper parties may be cited.

To this petition the respondent, her Majesty's Attorney-General, answered:—First, that he left the said petitioners to make such proof thereof as they shall be enabled; and,

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secondly, claimed on behalf of the Crown all such right and interest as he on behalf of the Crown should appear to have in the premises, and in any matter arising out of the proceedings upon this said petition, and submitted the same to the judgment, order, and direction of this honourable Court.

X. Y. S., the party cited, in substance answered that:—

1. The questions raised by the said petition (the material allegations of which I deny) have already been adjudged and finally determined against the first-named petitioner in suits instituted by him in the Court of Session in S., which judgments have been affirmed by the House of Lords, and will appear from the statement hereinafter contained; and I say that neither of the petitioners possesses the condition required by the first section of the Legitimacy Declaration Act, 1858, to entitle him or her to petition this honourable Court, or to claim the benefit of that Act.
- 1a. The matters raised by the petition were concluded by and in the judgments hereinafter mentioned.
2. That W. S. was, at the time of his death, owner in fee simple of landed property in A., and died without lawful issue, and intestate as to his estate in Scotland, leaving his nephew R. P. his heir-at-law, who thereupon became entitled to the said land (subject to the debts of the said W. S., which he, R. P., paid to a large amount), and was served thereto as heir, and entered into possession thereof; by such service his title to the estate, according to the law of S., was asserted and perfected; but was liable to be challenged within a certain period by action of reduction.
3. That on the 18th of December, 1801, the said W. P. R. S., then an infant, by H. C., his factor

loco tutoris, instituted in the Court of Session in S. (having jurisdiction) an action of reduction against the said R. P., seeking to have the said service set aside, on the ground that he, W. P. R. S., and not the said R. P., was the rightful heir-at-law of the said W. S., and entitled to the lands of R.; that R. P. duly appeared to and defended the said action, in which the following issues between the parties arose, whether the said W. P. R. S. was the legitimate son of the said W. S., and a natural-born subject of the realm, and heir-at-law of the said W. S.; that by decree of the said Court of the 1st of July, 1803, it was determined that the said W. P. R. S. was not the legitimate son of the said W. S., nor his heir-at-law, nor a natural-born subject of this realm, and that the said service should not be set aside.

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Ibid.

4. That the said decree was conclusive unless reversed by the House of Lords, to whom an appeal lay.
5. That a petition of appeal to the House of Lords, in which the same material questions were directly in issue, was presented; that the House of Lords, on the 3rd of March, 1808, affirmed the decree of the Court of Session; that by the said judgment the status of the said R. P., as heir-at-law of the said W. S., and the illegitimacy of the petitioner, W. P. R. S., became and were, as between the parties to the said cause, matters finally adjudged and determined.
6. A *bonâ fide* sale of the lands of R., with warranty, &c., by R. P. to W. P., who is now in possession.
7. That in February, 1848, the said W. P. R. S. instituted in the Court of Session in S. (having competent jurisdiction) an action of declarator, reduction, and count and reckoning, against W. P. and R. S. P., and the guardian of the latter (since deceased), seeking, among other things, to have the

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said service and the said decrees of the Court of Session and House of Lords and the said sale set aside, on the ground, as alleged, that the said service and decrees have been obtained by fraud of W. P., R. P., and H. C., then deceased; that on the 25th of April, 1849, pending the said last-mentioned action, the said W. P. R. S. instituted, in the said Court of Session, a supplementary action of declarator, reduction, and count and reckoning, against the same parties, seeking to have it declared that he, as the only and lawful son of the said W. S., was his lawful heir, and praying the same relief as before, which actions were conjoined; that by a decree of the Court of Session on the 10th March, 1852, it was adjudged that the said service and judgment and decrees had not been obtained by fraud, and that the said W. S. was not married to the said A. W. prior to the birth of the said W. P. R. S., &c.

8. That the said W. P. R. S. presented an appeal from the last-mentioned judgment to the House of Lords, who, on the 15th of May, 1854, affirmed in all respects the decree of the Court of Session in the said conjoined actions, and also adjudged that the said W. P. R. S. was not a natural-born subject, but an alien, which question was in issue between the parties.
9. That at the time of bringing the original action of declarator, reduction, &c., in the 7th paragraph mentioned, another action was brought in the Court of Session, as a Consistorial Court having jurisdiction, by the said W. P. R. S., against the same parties, called an action of declaration of legitimacy, which was suspended till the termination of the said conjoined actions, when judgment was given by default against the said W. P. R. S.

10. That the suits, actions and appeals in the 3rd, 5th, 7th and 8th paragraphs above-mentioned, were brought by the said W. P. R. S. for the same objects, and in respect of the same matters and things, as those for and in respect of which the said W. P. R. S. and the other petitioner now petition this Court, &c., and that the said final judgments and decrees in the said suits, actions, and appeals, are finally conclusive and binding as to those questions, and are a bar to the present petition.
11. That the petitioners ought not to have the relief and decree for which they pray, because such relief and decree would be a proceeding which would necessarily and unavoidably affect and be repugnant to, and inconsistent with, the said final judgments and decrees referred to, and would necessarily confer on the said W. P. R. S. the *status* or condition of heir-at-law to the said W. S., which has already by the said judgments been pronounced to have belonged to the said R. P., and successively to the said R. S. P., and would necessarily declare that the said W. S. and A. W. were lawfully married prior to the birth of the said W. P. R. S., and that the said W. P. R. S. is their legitimate son and heir, and a natural-born subject of the realm, contrary to the said final judgments and decrees whereby, &c., and that the relief and decree prayed by the said petitioners is precluded by the 10th section of the Legitimacy Declaration Act, 1858, whereby it is enacted "that no proceeding to be had under the said Act shall affect any final judgment or decree already pronounced or made by any Court of competent jurisdiction."
12. Denies that the said W. P. R. S. is a natural-born subject of the realm, or son and heir-at-law of the said W. S., or that the other petitioner has any

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Act, 1858.

Ibid.

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interest in the matter, save through the said
W. P. R. S.

13. Denies W. S. to have been the lawful father of
W. P. R. S.
14. Denies W. S. to have been at the time of his death
a British subject.
15. Denies the marriage of W. S. and R. K.
16. Denies the marriage of W. S., widower, to A. W.,
in 1790, or that from that time they cohabited
as lawful husband and wife, and were so
reputed, &c.
17. Denies any lawful issue of W. S. and A. W.
18. Denies any knowledge of, or privity to, the action
of ejectment in N. Y. in 1855.
19. Denies that W. P. R. S. was left in a state of
ignorance as to the alleged marriage of W. S. and
of other family matters, by any member of his
family, or was hindered from establishing in G. B.
the said alleged marriage by the conduct of R. P.,
J. P., or H. C.

Prayed to reject the prayer of the petition, and
to be dismissed with costs.

[*The affidavit verifying the petition will be as in Form 7,
ante, p. 298.*]

Citing third
persons to see
proceedings.
Attorney-
General, what
documents
served on.
No pleadings
except
petition and
affidavit in
support
served on
Attorney-
General.

The petitioner applies by summons before the registrar
for leave to cite such persons to see proceedings as the
necessities of the case may require, and serves the summons
on the Attorney-General, on whom all other summonses
and notices must also be served, if they in any way affect
his interest as statutory respondent. But with the excep-
tion of the copy of the petition and affidavit in support, it
is not necessary to serve any pleading between the other
parties upon the Attorney-General.

FORM 99.

Citation in Suit for Declaration of Legitimacy.

[Commencement as in Form 9, ante, p. 301.]

To X. Y. S., of , in the county of .

Citation,
form of.

WHEREAS W. P. R. S., of , and A. J. S., of , claiming to be domiciled in England, and our natural-born subjects, and to be respectively the natural and lawful son and grandson of W. S. and A. W., have filed their petition in the Divorce Registry of our said Court, praying for a declaration of the validity of the marriage between the said W. S. and A. W., and that the said W. P. R. S. be declared to be the natural and lawful son of the said W. S. and A. W. And whereas by an order, bearing date the day of , 18 , it was ordered that you, the said X. Y. S., a natural and lawful uncle of the said W. P. R. S., be cited to see proceedings in this suit. NOW THIS IS TO COMMAND, &c. (*Conclude as in Form 9.*)

The citation is not served upon the Attorney-General.

Need not be
served on
Attorney-
General.

After issue of the citation, the title of the above cause would be—

“W. P. R. S. and A. J. S.

Title of cause
after citation.

v.

The Attorney-General (X. Y. S. cited).”

The registrar's certificate is obtained, and the cause set down and heard, as shown *ante*, pp. 368—388.

Setting down
cause for
hearing,
hearing trial,
&c.
Certificates
of marriage
and other
documents
required to
be filed.

The marriage certificate (if any) of the parents of the petitioner or petitioners, and the certificate of the registration of the birth of the petitioners themselves, should be filed before applying for the registrar's certificate that the pleadings are in order.

[On the subject of fees and costs, see post, title “Practice as to Costs,” pp. 540—603.]

Fees.
Costs.

**Legitimacy
Declaration
Act, 1858.**

Guardian
to minor.

A petition by a minor to establish his legitimacy can only be brought by a guardian: *Upton, In re* (1860), 6 Jur. N. S. 404; and the Court will not assign a guardian unless satisfied the suit is for the benefit of the infant: *Chaplin, In re* (1867), L. R. 1 P. & D. 328; 36 L. J. P. 49, 90; 16 L. T. 154, 612.

For the practice as to assigning a guardian, see ante, pp. 319—328.

Trial by jury
of petition
under
Legitimacy
Declaration
Act, 1858.
Claim for a
declaration of
legitimacy
cannot be
inserted in a
statement of
claim in a
probate
action.

If the allegations in the petition are not traversed, the Court will not make an order for the issues in a suit under the Legitimacy Declaration Act to be tried by a jury: *Ryves and Ryves v. Att.-Gen.* (1865), L. R. 1 P. & D. 23; 35 L. J. P. 6; 13 L. T. 305; but, as a rule, the Court will, at the request of either party, direct the issues to be tried by a jury: *In re Bouverie* (1862), 2 S. & T. 548; 31 L. J. P. 79; 6 L. T. 692. A jury was refused in the case of *Sackville-West v. Att.-Gen.* (Lord Sackville and others cited), (1910) P. 143; 79 L. J. P. 34. A claim for a declaration of legitimacy cannot be joined with a claim for probate in a probate action: *Warter v. Warter* (1890), 15 P. D. 35; 59 L. J. P. 45; 62 L. T. 328.]

Summary Jurisdiction (Married Women) Act, 1895.

**SUMMARY
JURISDIC-
TION ACT,
1895
(58 & 59 Vict.
c. 39).**

[*For the practice as to appeals from magistrates under the above Act, see post, title "Practice as to Appeal," p. 525.*]

Practice as to Motions and Summonses.

**MOTIONS
AND SUM-
MONSES.**

The summary jurisdiction of the Court is exercised on motion, or by summons. These are of the same nature as those at common law, and a motion, in like manner, must generally be founded on affidavit. Summary jurisdiction of Court.
Motion.

As will be gathered from the following rules, the party desirous of making a motion must in general (unless it be an *ex parte* motion) serve on the opposite parties appearing, four clear days before the hearing thereof, a notice of motion in writing, signed by the party or his solicitor. It is sufficient service to leave the notice at the address for service furnished by the other side. If the order be obtained without due notice to the other side, such order will be rescinded. Notice of.

By rule 115, "When it is necessary to give notice of any motion to be made to the Court, such notice shall be served on the opposite parties who have entered an appearance four clear days previously to the hearing of such Four days notice of motion.

Motions and Summons.

motion, and a copy of the notice so served shall be filed in the registry with the case for motion, but no proof of the service of the notice will be required, unless by direction of the Judge Ordinary."

Order obtained without notice to the other side.

By rule 116, "If an order be obtained on motion without due notice to the opposite parties, such order will be rescinded on the application of the parties upon whom the notice should have been served; and the expense of and arising from the rescinding of such order shall fall on the party who obtained it, unless the Judge Ordinary shall otherwise direct."

Notice of motion not required where no appearance entered.

[It is not necessary to give notice of motion if no appearance has been entered by the other side.]

Case on motion, contents of.

By rule 147, "Cases for motion are to set forth the style and object of, and the names and descriptions of the parties to, the cause or proceeding before the Court; the proceedings already had in the cause, and the dates of the same; the prayer of the party on whose behalf the motion is made, and briefly, the circumstances on which it is founded."

By rule 148, "If the cases tendered are deficient in any of the above particulars, the same shall not be received in the registry without permission of one of the registrars."

Affidavits in support.

By rule 149, "On depositing the case in the registry, and giving notice of the motion, the affidavits in support of the motion, and all original documents referred to in such affidavits, or to be referred to by counsel on the hearing of the motion, must be also left in the registry; or in case such affidavits or documents have been already filed or deposited in the registry, the same must be searched for, looked up, and deposited with the proper clerk, in order to their being sent with the case to the Judge Ordinary."

Copies of affidavits to

And by rule 150, "Copies of any affidavit or documents to be read or used in support of a motion are to be de-

livered to the opposite parties to the suit who are entitled to be heard in opposition thereto.”

The applicant or his solicitor must therefore file in the registry the following documents:—

**Motions and
Summonses.**
be delivered
to other side.
Documents
to be filed.

1. Case for and copy notice of motion.
2. Affidavits in support.
3. Any original documents referred to in such affidavits or to be referred to by counsel.

Copies of the affidavits or documents to be used should be delivered to the other side in time to allow of their being answered, or the motion may be adjourned for that purpose.

Copies to be
delivered to
the other
side.

The motion papers, together with all the papers already filed in the cause, are sent from the Divorce Registry to the Court, before the hearing of the motion.

The following are suggested as forms of notice of case on motion:—

FORM 100.

Notice of Motion.

[*Heading in Cause as, e.g., in Form 8.*]

Take notice that this honourable Court will be moved on Monday, the day of , 19 , by counsel on behalf of (*as the case may be*) to (*set out fully the nature of the application, and conclude with the words*), or in the alternative for such other order as to the Court shall seem meet.

Dated the day of , 19 .
(Signed) R. C. B.
Solicitor for the petitioner.

To W.
Solicitor for the respondent.

[*But any notice of motion that fulfils the requirements of rule 113, ante, p. 375, will suffice.*]

**Motions and
Summonses.**

FORM 101.

Case on
motion,
form of.

Case on Motion.

[*Heading in Cause as, e.g., in Form 8, ante, p. 299.*]

Case on behalf of A. B., the petitioner (*or as the case may be*), to dispense with making the alleged adulterer a co-respondent (*or to dispense with personal service of the citation on* , *or as the case may be*).

1. This is a suit for dissolution of marriage brought by A. B. against C. B. his wife, on the ground of her adultery with R. S. (*or as the case may be*).
2. (*Set out the grounds for making the application, as "the said R. S. died on or about the day of , 19 " (or set out fully attempts that have been made to effect service, together with account of enquiries as to the whereabouts of the party it is desired to serve, &c., taking care to give the Court the fullest information in your power, whatever the nature of the application may be).*)

Copies of the following papers are left herewith:—

1. Petition for dissolution of marriage.
2. Affidavits of G. H. as to .
3. Affidavit of J. K. on the same subject.

Counsel on behalf of (*as the case may be*) will move that he be excused from making the alleged adulterer a co-respondent (*or whatever the nature of the application may be*).

Dated the day of , 19 .

Day for
hearing
motions.
When papers
to be left in
registry.

There is a special day fixed for taking motions, generally Monday, in each week; and the above-mentioned documents, on which the motion is to be founded, must be filed in the registry before 2 p.m. on the preceding Wednesday; except for the first motion day in each sitting, when they must be filed before 2 p.m. on the preceding Tuesday.

In vacation, motions are heard by the registrars every alternate Wednesday.

Ex parte applications do not require notice to be given to the other side. Motions and Summons.

Due notice of the motion days during the sittings are printed in what are called "term cards," which can be obtained at Somerset House, the Royal Courts, and elsewhere, and vacation notices are posted up at the Divorce Registry, which give the days on which the registrars will hear motions. *Ex parte* applications.
Printed lists of motion days.

There are several distinct cases where the rules expressly require the application to be made by motion. They are as follows:— List of matters dealt with on motion only.

1. Application to dispense with making a co-respondent (*rules 4 and 5*). Dispensing with co-respondent.
2. To substitute some mode other than personal for service of petitions, citations, or any orders, &c. requiring personal service (*rules 13 and 97*). Substituted service.
3. For leave to intervene when the proposed intervenor is one of the public (*rule 23*). No motion to intervene is necessary when the King's Proctor intervenes in his official capacity. Leave to intervene.
4. To object to or confirm registrar's report as to maintenance and variation of settlements (*rule 102*). To confirm registrar's report; maintenance and settlements.
5. For writ of attachment (*rule 110*). Attachment.
6. To discharge protection order (*rule 125*). Discharging protection order.
7. For an injunction to restrain one of the parties from annoying the other unnecessarily, or from dissipating his or her property. Injunction.

The above appear to be the only matters which it is necessary to bring before the Court by motion, though there may be important and unusual applications which should still be made by motion.

It is a little difficult to understand the case of applications for the "*custody, maintenance, and education of*" as distinguished from "*access to*" children. In the sixth edition of this work, published in 1896, it is laid down that applications for the custody of children must Custody of children; practice as to motion altered.

Motions and Summons.*Ibid.*

be made on motion. And indeed, on reference to the rules, such would appear to be the case. Rule 104 requires all orders for custody, maintenance, education of, or access to, children to be applied for by motion. Rule 212 permits applications for access only to be made in the first instance on summons to a registrar, but is absolutely silent as to custody, maintenance, and education. No new rule on the subject has ever been promulgated, and yet for some years all these matters have been dealt with in chambers, contrary to the express provisions of the rules as they still stand.

Motions on appeal.

[*Motions by way of appeal from the judge in chambers, to himself sitting in Court, and motions to a Divisional Court, are dealt with under title "Appeal," post, p. 525.*]

Affidavits filed in opposition to motion.

Practice as to handing in in Court.

Affidavits sworn in opposition to the motion are handed in at the hearing. The parties tendering them hand in the stamp for the filing fee (2s. 6d.) at the same time (which is generally pinned on to the document, in order that it may be affixed by the proper officer, who sends them on to the Divorce Registry, after the motion has been heard, for filing). If not handed in at the hearing of the motion, such affidavits cannot be filed without leave of the Court.

Copies of affidavits in opposition should be delivered to other side as soon as possible.

Adjournment of motion.

The party opposing the motion should deliver copies of the affidavits it is proposed to use in answer to the other party as soon as possible, that he or she may have the opportunity of becoming acquainted with the contents of such affidavits.

If the motion cannot be disposed of at the hearing, it is adjourned. If so, a notice of renewal must be filed in the Divorce Registry (filing fee 2s. 6d.), and the same process is gone through with respect to fresh affidavits and counter affidavits as before.

Practice as to.

All the papers in the cause, besides those used at the first hearing of the motion, must be before the Court on

the adjourned hearing; and if any of them have been returned into the registry, they are sent back to the Court for that purpose.

Motions and
Summonses.

The order, when made, is entered in the motion book for the day by the registrar who is then sitting in Court. It is not necessary to leave counsel's briefs.

Order on
motion.

If an office copy is required, it can be ordered any time not less than forty-eight hours after the hearing.

Office copy of.

[*For time for appeal, see post, title "Appeal," p. 525.*] Time for
appeal.

FEES.

	£	s.	d.
Filing case (including the order)	0	10	0
Filing notice	0	2	6
Filing affidavits (each)	0	2	6
Filing notice of renewal (if any)	0	2	6

[*For costs allowed on taxation, see post, pp. 540—603.*]

All other ordinary applications should be made by summons, and not by motion, and it has been laid down that, where a wife's application should have been made by summons and not by motion, if made by motion the husband will be liable for so much only of the costs of the application as would have been incurred on summons.

Summonses.
Effect of
making
motion
instead of
summons.

Applications expressly directed to be made on summons, if made on motion, would, in addition to the loss of costs, be probably rejected.

[It would seem that an application to dismiss a petition for dissolution by consent ought now to be made by summons in chambers and not by motion in open Court: *Slater v. Slater and Bolderson* (1900), 69 L. J. P. 48.]

Application
to dismiss
petition for
dissolution
by consent;
summons,
not motion.

Motions in open Court, it is needless to say, must always be made by counsel. In the case of summonses counsel are usually taken before the registrar when the matter is of importance.

Motions and
Summonses.

Certificate
for counsel
necessary on
summons
before
registrar ;

but not before
judge.

Nearly all
summonses
now heard
in the first
instance
before a
registrar.

When counsel appear before a registrar it is necessary they should ask for a certificate that the case is a fit and proper one for counsel to attend, otherwise the costs of such attendance will not be allowed on taxation either as party and party costs or between solicitor and client.

On the other hand, the costs of counsel on summonses before a judge are always allowed.

The following rules are so important that though they have already been given *in extenso, ante*, p. 284, it has been thought worth while to repeat them here.

The practical effect of them is that nearly all summonses come before the registrar in the first instance, and that the words "*Judge Ordinary*" occur in most places where the word "*registrar*" ought to be substituted.

ADDITIONAL AND AMENDED RULES, 23RD FEBRUARY,
1875.

Ibid.

By rule 181, "All summonses heretofore heard by the registrars of the principal registry of the Court of Probate in the absence of the Judge Ordinary shall hereafter be heard before one or more of the registrars at the principal registry of that Court during the period appointed for the sittings of the Court at Westminster, as well as in the judge's absence."

By rule 182, "All rules and regulations in respect to summonses now heard before the Judge Ordinary in chambers at Westminster shall, so far as the same are applicable, be observed in respect of the summonses heard before one or more of the registrars at the principal registry."

[See rules from 160 to 168.]

By rule 183, "The registrar before whom the summons is heard will direct such order to issue as he shall think fit, or refer the matter at once to the Judge Ordinary."

By rule 184, "Any person heard on the summons objecting to the order so issued under the direction of the registrars may, subject to any order as to costs, apply to the Judge Ordinary on summons to rescind or vary the same."

Motions and
Summonses.

Appeal from
registrar to
judge.

And by rule 168, "The same rules and regulations shall, so far as applicable, be observed in respect of summonses which may be heard and disposed of by the registrars."

By rule 160, "A summons may be taken out by any person in any matter or suit depending in the Court for divorce and matrimonial causes, provided there is no rule or practice requiring a different mode of proceeding."

Summons,
who may
take out.

[*The following forms of summonses may be found useful as precedents:*]

FORM 102.

General Form of Summons before a Judge.

Summons
before judge,
form of.

[*Heading in Cause as, e.g., in Form 8, ante, p. 299.*]

Let the petitioner's (*or* respondent's) solicitor or agent attend one of the judges of this division at his chambers at the Royal Courts of Justice on next, the day of , 19 , at of the clock in the noon, to show cause why the

[*Insert here particulars of application.*]

Dated the day of , 19 .

This summons issued by W. W. & Co., solicitors for respondent (*or* petitioner).

FORM 103.

The same before a Registrar.

Ibid. before
registrar.

[*Heading in Cause as, e.g., in Form 8, ante, p. 299.*]

Let the petitioner's (*or* respondent's) solicitor or agent attend one of the registrars at the registry of the

Motions and
Summonses.

High Court of Justice, at Somerset House, Strand, in the county of Middlesex, on next, the day of , at of the clock in the noon, to show cause why

[Conclude as in Form 102.]

FORM 104.

Summons for
appointment
of medical
inspectors ;
nullity.

Summons for Appointment of Medical Inspectors in a Suit for Nullity on the ground of Impotence.

B. (otherwise K.) v. K.

Let the respondent's solicitor or agent attend before one of the registrars at the Divorce Registry of our said Court, at Somerset House, Strand, in the county of Middlesex, on next, the day of , 19 , at 11.30 in the forenoon, to show cause why medical inspectors should not be appointed to examine and inspect and report in writing upon the parts and organs of generation of B., otherwise K., the petitioner in this cause, and of K., the respondent in this cause.

Dated the day of , 19 .

This summons issued by
solicitor for .

[The words "and also to show cause why this cause should not be heard in camerâ" can be added to this summons.]

Two copies of
summons to
be prepared
by solicitor.
Practice as to,
in registry.

Two copies of each summons should be prepared and settled by the solicitor and taken to the Divorce Registry (Room 38) by the solicitor. The particulars of the summons should be filled in, and the day and hour at which it is returnable. One copy should be indorsed in the cause, and the fee stamps (8s.) affixed to the other at the bottom corner on the right hand. The indorsed copy is stamped with the judge's signature and returned to the solicitor, the other retained in the registry. If the summons is to be attended by counsel, it should be marked "counsel"

If to be
attended by
counsel, to be
so marked.

before it is served, so that the other side may be made aware of the fact. Motions and Summons.

By rule 161, "The name of the cause or matter, and of the agent taking out the summons, is to be entered in the summons book, and a true copy of the summons is to be served on the party summoned one clear day at least before the summons is returnable, and before 7 o'clock p.m. On Saturdays the copy of the summons is to be served before 2 o'clock p.m." Service of summons.

By rule 162, "On the day and at the hour named in the summons the party taking out the same is to present himself with the original summons at the judge's chambers, or elsewhere appointed for hearing the same." Hearing of summons.

[The affidavits which are to be made use of as evidence at the hearing should be left with the registrar, with the stamp for the fee (2s. 6d.) pinned on to them.]

By rule 163, "Both parties will be heard by the Judge Ordinary (or registrar), who will make such order as he may think fit, and a minute of such order will be made by one of the registrars in the summons book." Ibid.

[See also rules 181 to 184.]

The signed summons must be produced at the hearing. The registrar sometimes refers the matter to the judge. In any event an appeal lies by summons to the judge within four days.]

Summonses are heard by the judge at the Royal Courts of Justice, in his chambers, every Saturday during the sittings at half-past ten, and, on application by counsel under special circumstances, at other times. When and where summonses heard.

The registrars hear summonses at the principal Probate and Divorce Registry every Tuesday and Friday during the sittings at half-past eleven, and every day during the vacations that the registry is open, at the same hour.

By rule 164, "If the party summoned do not appear after the lapse of half an hour from the time named in the summons, the party taking out the summons shall be at Party summoned failing to attend.

Motions and
Summonses.

liberty to go before the Judge Ordinary" (or "registrar"), "who will thereupon make such order as he may think fit."

Ibid. order
made.

And by rule 166, "If a formal order is desired, the same may be had on the application of either party, and for that purpose the original summons, or the copy served on the party summoned, must be filed in the registry. An order will thereupon be drawn up, and delivered to the person filing such summons or copy."

Affidavit of
service
required.

It is necessary also to file an affidavit of service and non-attendance, which should be (more or less) in the following form:—

FORM 105.

Affidavit of Service and Non-Attendance.

Affidavit of
service of
summons,
form of.

[*Heading in Cause as, e.g., in Form 8, ante, p. 299.*]

I, R. C. B., of 225, Coleman Street, in the city of London, solicitor for the petitioner in this cause, make oath and say:—

1. That I did on the day of , in the year of our Lord one thousand eight hundred and , before the hour of five of the clock in the evening, serve C. B., the respondent [*or as the case may be*] in this cause, with a true copy of the summons hereunto annexed (marked) by leaving the same at the office of the solicitors of the said C. B. (Messrs. B. & J.), situate at 66, Frederick's Place, in the said city, with W. B., one of the partners in the said firm there.
2. And I further say that I did attend the said summons at the return thereof, that is to say, on the day of , at , from the hour of of the clock in the noon until half an hour after the said hour of of the clock on that day, but that the said did not nor did any person on

her behalf attend to oppose an order being made on the said summons to my knowledge or belief.

Motions and
Summons.

Sworn, &c.

[Forms of this affidavit may be obtained in the registry (Room No. 43). The summons annexed must be marked by the Commissioner who swears the affidavit. The order may be called for two or three days later.]

Summons
should be
annexed to
affidavit and
marked by
commissioner.

By rule 165, "An attendance on behalf of the party summoned for the space of half an hour, if the party taking out the summons do not during such time appear, will be deemed sufficient, and bar the party taking out the summons from the right to go before the Judge Ordinary (or registrar) on that occasion."

Non-attend-
ance of party
taking out
summons.

The solicitor, having complied with the above rule, can ask the registrar to mark his attendance on the summons with his costs (6s. 8d.).

Solicitor can
ask registrar
to mark his
attendance
and costs upon
summons.
Consent
summons.

By rule 167, "If a summons is brought to the registry, with consent to an order endorsed thereon, signed by the party summoned, or by his proctor, solicitor, or attorney, an order will be drawn up without the necessity of going before the Judge Ordinary; provided that the order sought is in the opinion of the registrar one which, under the circumstances, would be made by the Judge Ordinary."

[The order will be drawn up in due course, and may be obtained a day or two afterwards. But a summons must have been taken out, otherwise the consent cannot be filed.]

Practice.

If the registrar refers the matter before him to the judge, he adjourns the summons to the judge in chambers. The judge then hears it on the first day on which he happens to be hearing summonses. The solicitor gives notice of the adjournment to the Divorce Registry where the summons is placed in the adjourned summons book, and from whence the necessary papers are forwarded to the Court. If the solicitor fails to give immediate notice to the Divorce Registry, the hearing of the adjourned

Summons
adjourned
to judge;
practice on
adjournment.

- Motions and Summonses.** - summons may be delayed, which will probably mean that it will not be heard for a week later than it ought to be.
- Appeal.** [*As to appeals from the judge in chambers, see post, title "Appeal," p. 525.*]
- Order on summons.** The order made on the summons is drawn and signed by the registrar, and can be obtained in the Divorce Registry the next day. It is entered on the minutes of the cause.
- Service of order.** The order must be served by leaving a plain copy with the solicitor for the other side, or at the address for service if such party appear in person.
- [*With respect to the costs of summonses, see post, title "Practice as to Costs," p. 540.*]
- Property claimed by wife, registrar can only report as to.** In a suit for dissolution the registrar cannot make an order on summons directing the husband to give up property claimed by the wife. He can only inquire and report as to the property: *Wood v. Wood and White* (1889), 14 P. D. 157; 58 L. J. P. 68; 61 L. T. 338. See also *De Ricci v. De Ricci*, (1891) P. 378; 61 L. J. P. 17.]

Practice as to New Trial and Re-hearing.

NEW TRIAL
AND RE-
HEARING.

[This subject is dealt with in the next title, "Appeal."
See also Part I., Chap. XV., pp. 223—227.]

Appeal.

APPEAL.

The following is a short summary of what are the actual rights of appeal in causes and other proceedings in the Matrimonial Court at the present time:—

Appeals in
matrimonial
causes, &c.

1. *From the decisions of justices under the Summary Jurisdiction (Married Women) Act, 1895, an appeal lies to a Divisional Court of the Probate, Divorce, and Admiralty Division (see ante, p. 215).*

From justices
to Divisional
Court.

2. *An application for a re-hearing of a divorce cause as distinguished from a new trial (that is, where such cause has been heard without a jury, see ante, p. 223), must also in the first instance be made to a Divisional Court of that Division, from whose decision an appeal lies to the Court of Appeal.*

For re-
hearing; to
Divisional
Court in first
instance.

3. *From a decision on a summons before the registrar at chambers an appeal lies to a judge at chambers, from the judge at chambers to the judge in Court, from the judge in Court to the Court of Appeal, and from thence (with leave) to the House of Lords.*

From judge
in chambers.

[But appeals from orders in chambers are subject to the same rules in the Probate as in the Chancery Division, and will not be entertained by the Court of Appeal unless the judge gives leave to appeal direct, or certifies that he does not require to hear further argument: *In re Smith, Rigg v. Hughes* (1884), 9 P. D. 68; 53 L. J. P. 62; 50 L. T. 293.]

Appeal. 4. *Every application for a new trial of a matrimonial cause must, since the coming into force of the Supreme Court of Judicature Act, 1890 (53 & 54 Vict. c. 44), be made in the first instance direct to the Court of Appeal, instead of as previously to a Divisional Court of the Probate, Divorce, and Admiralty Division.*

Appeal to House of Lords without leave.

[An appeal lies without leave to the House of Lords from an order of the Court of Appeal for a new trial of a suit in which a decree *nisi* has been granted by the Divorce Court on the verdict of a jury: *Butchart v. Butchart and Hill*, (1901) A. C. 266; 70 L. J. P. 29; 84 L. T. 209.]

Costs of wife in House of Lords.

Except in very exceptional cases, a wife is not entitled as against her husband to her costs of an appeal to the House of Lords where she is the appellant, if the judgments of the Courts below have found her guilty of a matrimonial offence, and have declared her to have ceased to be the wife of the respondent: *Begg v. Begg* (1890), 15 App. Cas. 170.]

From other decisions.

5. *All other appeals from the decisions in causes matrimonial must be made in the first instance to the Court of Appeal, from whence an appeal lies (with leave) to the House of Lords.*

What decisions of Court of Appeal give right to go to House of Lords without leave.

A party may appeal without leave to the House of Lords from any decision of the Court of Appeal upon the grant or refusal of a decree on a petition for dissolution or nullity of marriage, or for a declaration of legitimacy, but in every other case the leave of the Court of Appeal must be obtained before a party to a matrimonial cause can go to the House of Lords.

6. *By sect. 49 of the Judicature Act, 1873:*

As to costs, &c.

“No order made by the High Court of Justice or any Judge thereof, by the consent of parties, or as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or Judge making such order.”

Appeal formerly to full Court up to 1881.

In the sixth edition of this work the various alterations in the mode of appeal in causes, &c. matrimonial, from the first institution of the Divorce Court to the year 1897,

are carefully traced. But, however interesting to the student, disquisition on the past history of appeal in the Divorce Court is not consistent with the purpose of the present edition.

Appeal.

For our present purpose it is sufficient to say that up to the year 1881, an appeal from the decisions of the Judge Ordinary lay to a tribunal called the "Full Court," consisting usually of three judges—though seven judges besides the Judge Ordinary were liable to be called to sit upon it at any time—and constituted and regulated by the Mat. C. Act, 1857, ss. 8, 55 and 56; the Mat. C. Act, 1858, s. 17; the Mat. C. Act, 1860, ss. 1, 2 and 3; and the Mat. C. Act, 1868, s. 3.

Former practice.

Now by sect. 9 of the Supreme Court of Judicature Act, 1881 (44 & 45 Vict. c. 68), it is enacted that: "All appeals which, under section fifty-five of the Act of the twentieth and twenty-first years of her present Majesty, chapter eighty-five, or under any other Act, might be brought to the full court established by the said first-mentioned Act, shall henceforth be brought to her Majesty's Court of Appeal and not to the said full court.

Now to Court of Appeal.

"The decision of the Court of Appeal on any question arising under the Acts relating to divorce and matrimonial causes or to the declaration of legitimacy, shall be final, except where the decision either is upon the grant or refusal of a decree on a petition for dissolution or nullity of marriage, or for a declaration of legitimacy, or is upon a question of law on which the Court of Appeal give leave to appeal; and, save as aforesaid, no appeal shall lie to the House of Lords under the said Acts.

Appeal to House of Lords

"Subject to any order made by the House of Lords, in accordance with the Appellate Jurisdiction Act, 1876, every appeal to the House of Lords against any such decision shall be brought within one month after the decision appealed against is pronounced by the Court of Appeal, if the House of Lords is then sitting, or, if not, within fourteen days after the House of Lords next sits.

must be within one month.

Appeal.

“This section, so far as is consistent with the tenor thereof, shall be construed as one with the said Acts.”

Appeal to
House of
Lords against
decree
absolute.

And by sect. 10 of the same Act, “No appeal from an order absolute for dissolution or nullity of marriage shall henceforth lie in favour of any party who, having had time and opportunity to appeal from the decree *nisi* on which such order may be founded, shall not have appealed therefrom.”

Appeal to
House of
Lords
generally.

[An appeal to the House of Lords in a matrimonial cause lies only from a decision of the Court of Appeal. For instance, if a respondent desires to appeal against a decree *nisi*, he or she must appeal to the Court of Appeal. But if the Court of Appeal make the decree absolute, then (but not before) the respondent may appeal against the decree absolute to the House of Lords.

Time for.

An appeal to the House of Lords must be within one month after the decision appealed against has been pronounced by the Court of Appeal, if the House is then sitting. If not, then within fourteen days after the House next sits: *Cleaver v. Cleaver* (1884), 9 App. Cas. 631.]

Application
for new trial
or rehearing
previous to
passing of
Judicature
Act, 1890.

By rule 62, an application for a new trial of the issues of fact tried by a jury, or for a re-hearing of a cause, shall be made to a Divisional Court of the Probate, Divorce, and Admiralty Division, and shall be by notice of motion filed in the registry, stating the grounds of the application, and whether all or part only of the verdict, or findings, or decree is complained of; and such notice of motion shall be filed and served upon the other parties to the cause or their solicitors *within eight days* after the trial or hearing, and the motion shall be made *eight days* after the service of such notice *if a Divisional Court be then sitting*, otherwise on the first day appointed for a sitting of the Divisional Court. The time of the vacations shall not be reckoned in the computation of time for serving such notice.

And by rule 62a, the notice of motion may be amended

at any time by leave of the Court or a judge, on such terms as the Court or judge may think fit. Appeal.

Rule 62 was amended as above in 1887, previous to which time applications for a new trial or rehearing were made to a judge of the Probate Division sitting alone.

From the decision of the Divisional Court an appeal lay to the Court of Appeal.

As motions for rehearing of a cause heard before the Court itself are still made to a Divisional Court, the practice with respect to such motions is still governed by rule 62. The following form of notice may be useful as a precedent:— Rehearing,
motion for.

FORM 106.

Notice of Motion for a Rehearing.

Form of.

[Heading in Cause as, e.g., in Form 32.]

Take notice that the Divisional Court of the above Division will, on the day of , 19 , be moved by counsel on behalf of the petitioner [*or* respondent] for a rehearing of the above cause on the following grounds:—

1. That the verdict of the jury upon the issue charging the petitioner with adultery was against evidence:
2. That the verdict of the jury upon the issue charging the petitioner with desertion was against evidence:
3. That the right honourable the President misdirected the jury.

[State grounds of misdirection.]

To Messrs. W. W. & Co.,

66, Frederick's Place, Old Jewry, E.C.,

Respondent's [*or* petitioner's] solicitors.

By sect. 1 of the Supreme Court of Judicature Act, 1890 (53 & 54 Vict. c. 44), "From and after the commencement of this Act, every motion for a new trial, or to set aside a verdict, finding, or judgment, in any cause or Supreme
Court of
Judicature
Act, 1890
(53 & 54 Vict.
c. 44), s. 1.

Appeal.

Motions for
new trial.

matter in the High Court in which there has been a trial thereof, or of any issue therein with a jury, shall be heard and determined by the Court of Appeal, and not by a divisional court of the High Court: Provided always, that such motions shall be heard and determined before not less than three judges of the Court of Appeal sitting together."

Rehearing
still to
Divisional
Court.

[For some time after the passing of this statute it was held that every application, either for a new trial or a rehearing of a divorce cause, must be made in the first instance direct to the Court of Appeal. But on July 21st, 1897, it was decided by the Court of Appeal that sect. 1 did not apply to applications for a "rehearing," but that all such applications must be made in the first instance to a Divisional Court of the Probate, Divorce and Admiralty Division: *Smith v. Smith* (J. M. Nowers intervener), (1897) P. 293; 66 L. J. P. 151; 77 L. T. 206; see also *Watson v. Watson* (1903), 89 L. T. 78. Where a case tried by a judge in the Court below, without a jury, comes before the Court of Appeal (*which may still happen in a matrimonial cause on appeal from the Divisional Court*), that Court will presume that the decision of the judge on the facts was right, and will not disturb it unless the appellant satisfactorily makes out that it was wrong (per Lord Esher, M. R., and Lopes, L. J.). Per Kay, L. J.: "Under Order LVIII. the Court of Appeal is bound to try the case and give the judgment which ought to have been given, though in a doubtful case the judgment of the Court below is entitled to great weight": *Colonial Securities Trust Co. v. Massey*, (1896) 1 Q. B. 38; 65 L. J. Q. B. 100; 73 L. T. 497. Previously to the passing of this statute it was held by the Court of Appeal that an appeal against the decision of a judge of the Divorce Court granting or refusing a new trial or rehearing in the Divorce Court must be made within fourteen days, in accordance with the Divorce Act, 1860, s. 2; and that the Court of Appeal had no power to enlarge the time: *Ahier v. Ahier* (1885), 10 P. D. 110; 54 L. J. P. 70; 52 L. T. 744. But the Court of Appeal has since held, that in spite of Ord. LXVIII. r. 1, which excepts matrimonial causes from the operation of the rules and orders of the Supreme Court, since the passing of the Supreme Court of Judicature Act, 1890, the practice with regard to a new trial of a divorce cause is regulated (not by the practice under the Matrimonial Causes

Duty of Court
of Appeal
where case
tried by
Judge in
Court below.

Enlarging
time for
appeal.

Acts, but) by the practice of the Court of Appeal, and consequently rule 7 of Ord. LXIV. of the Rules of the Supreme Court applies, and empowers the Court to grant an enlargement of the time within which to move for a new trial of the cause, and as a condition of so doing to impose terms on the party who makes the application: *Wilkins v. Wilkins*, (1896) P. 108; 65 L. J. P. 55; 74 L. T. 62.

On application for a new trial the Court of Appeal has power to enter judgment for the appellant if convinced that the verdict is perverse, and that no further evidence could be given: *Allcock v. Hall*, (1891) 1 Q. B. 444; 60 L. J. Q. B. 416; 64 L. T. 309. When the Court of Appeal is equally divided, and the decision is unreversed, it is not bound, when a similar case is brought before it, by the decision in the previous case: *The Vera Cruz* (1884), 9 P. D. 96; 53 L. J. P. 33; 51 L. T. 104. The Court of Appeal has no jurisdiction to entertain an original application to dismiss an action for want of prosecution, although the delay relied on is in not proceeding to a new trial ordered by the Court of Appeal: *Roberts v. French* (1895), 72 L. T. 147.]

Appeal.

Court of Appeal may enter judgment for appellant instead of granting new trial.

Court of Appeal equally divided. Cannot entertain original application to dismiss case for want of prosecution.

By the Supreme Court of Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 1, it is enacted that—

S. C. J. Act, 1894 (57 & 58 Vict. c. 16), s. 1.

1.—(1.) No appeal shall lie—

- (a) from an order allowing an extension of time for appealing from a judgment or order; nor
- (b) without the leave of the Judge, or of the Court of Appeal, from any interlocutory order or interlocutory judgment made or given by a Judge, except in the following cases, namely:—

Regulations as to appeals.

- (i.) where the liberty of the subject or the custody of infants is concerned; and
- (ii.) cases of granting or refusing an injunction or appointing a receiver; and
- (iv.) any decree *nisi* in a matrimonial cause, . . . ; and
- (vi.) such other cases, to be prescribed by Rules of Court, as may in the opinion of the authority for making such rules be of the nature of final decisions.

Provisions as to appeal.

Appeal.

Applications
for leave to
appeal.

(4.) In matters of practice and procedure every appeal from a Judge shall be to the Court of Appeal.

(5.) In all cases where there is a right of appeal to the High Court from any court or person, the appeal shall be heard and determined by a Divisional Court constituted as may be prescribed by Rules of Court; and the determination thereof by the Divisional Court shall be final, unless leave to appeal is given by that court or by the Court of Appeal.

(6.) An application for leave to appeal may be made *ex parte* or otherwise, as may be prescribed by Rules of Court.

Rules of
Divorce
Court not
exhaustive.

[The Rules of the Divorce Court are not exhaustive, and where they fail to meet any particular case the Court may follow the Rules of the Supreme Court, notwithstanding the provision of Ord. LXVIII. r. 1, that they shall not affect proceedings in matrimonial causes, &c.: *Giles v. Giles*, (1900) P. 17; 69 L. J. P. 26; 81 L. T. 823.]

Application
to Court of
Appeal for
new trial;
practice.

It may be taken that the practice with respect to application to the Court of Appeal for a new trial of a matrimonial cause is now entirely regulated by the Rules of the Supreme Court, Ord. XXXIX. rr. 3, 4, 5 and 7.

Must be by
motion.

By rule 3, "Every application for a new trial shall be by notice of motion, and no rule *nisi*, order to show cause, or formal proceeding other than such notice of motion shall be made or taken. The notice shall state the grounds of the application, and whether all or part only of the verdict or findings is complained of."

Notice of
motion.

The notice of motion for a new trial should, it is submitted, be in the same form as a notice of motion for a rehearing (Form 106), substituting the words "new trial" for "rehearing," and "Court of Appeal" for "Divisional Court."

Notice of
motion;

By rule 4, "The notice of motion shall be a fourteen days' notice, and shall be served within the times follow-

ing: viz., if the trial has taken place in London or Middlesex within eight days after the trial."

Appeal.

time for
service.

[As all matrimonial causes are tried in London, the notice must in every case be served within eight days of the trial.]

"The time of the vacations shall not be reckoned in the computation of the time for serving the notice of motion."

By rule 5, "The notice may be amended at any time by leave of the Court or a judge on such terms as the Court or judge may think just."

Amending
notice of
motion.

And by rule 7, "A new trial may be ordered on any question, whatever be the grounds for the new trial, without interfering with the finding or decision upon any other question."

New trial
may be
ordered on
any question
without
affecting rest
of judgment.

The following form is given in the Appendix to the authorized edition of the Rules and Orders of the Divorce Court amongst "Forms which are to be followed as nearly as the circumstances of the case will allow." It is given here without comment.

FORM 107.

Appeal.

I, A. B., the petitioner (*or* C. D., the solicitor of A. B. the petitioner), in a suit lately depending in the Probate, Divorce and Admiralty Division of the High Court of Justice, entitled A. B. against C. B. and R. S., do hereby, in due time and place, complain of and appeal against a certain order or decree made in the said cause by the right honourable the President of the said Division on the day of , 19 , whereby, amongst other things, the said President did order and decree

Appeal,
form of.

[Here set forth the whole of the decree, or such part of it as may be appealed against.]

(Signed)

A. B.

or

C. D.

Appeal.

This instrument of appeal was lodged in the Divorce Registry of the Probate, Divorce and Admiralty Division of the High Court of Justice, this day of 19 .

[To be signed by a clerk in the registry.]

Perhaps, together with a notice in the following form, the above might constitute a more satisfactory form of notice under Ord. XXXIX. r. 3, than Form 106.

FORM 108.

Notice of
appeal,
form of.

Notice of Appeal.

225, Coleman Street, E.C.,
October 16, 1911.

Dear Sirs,

A. B. v. C. B. and R. S.

Please take notice that I have to-day duly lodged and filed the necessary documents (whereof I send you copies herewith) for the purpose of appealing to the Court of Appeal on behalf of the petitioner in the above cause.

Truly yours,
B. & J.

To Messrs. W. W. & Co.,
66, Frederick's Place, Old Jewry, E.C.

Notice by
respondent
in lieu of
cross appeal.

By Order LVIII. rule 6, "It shall not, under any circumstances, be necessary for a respondent to give notice of motion by way of cross appeal, but if a respondent intends, upon the hearing of the appeal, to contend that the decision of the Court below should be varied, he shall within the time specified in the next rule, or such time as may be prescribed by special order, give notice of such intention to any parties who may be affected by such contention. The omission to give such notice shall not diminish the powers conferred by the Act upon the Court of Appeal, but may, in the discretion of the Court, be ground for an

adjournment of the appeal or for a special order as to costs." Appeal.

And by rule 7 such notice is to be an eight days' notice in the case of an appeal from a final judgment, and two days' notice in the case of an appeal from an interlocutory order. Time for such notice.

[When a respondent has given notice under the above rule, and the appellant subsequently withdraws his appeal, such notice should be treated as a cross appeal to the extent that on the original notice of appeal being withdrawn by the appellant the respondent should have the right to elect whether to persevere with or withdraw the cross appeal. If the respondent elect to adopt the former course, then the appellant shall have the right to give a cross notice, stating that he intends to bring forward the subject-matter of his original notice of appeal on the hearing of the respondent's appeal: *The Beeswing* (1885), 10 P. D. 18; 54 L. J. P. 7; 51 L. T. 883.] Right of respondent to continue cross appeal.
Right of original appellant to give cross notice.

By Order LVIII. r. 15, ". . . no appeal to the Court of Appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall be brought after the expiration of fourteen days, and no other appeal shall be brought after the expiration of *three months*. The said respective periods shall be calculated, in the case of an appeal from an order in chambers, from the time when such order was pronounced, or when the appellant first had notice thereof, and in all other cases, from the time at which the judgment or order is signed, entered, or otherwise perfected, or, in the case of the refusal of an application, from the date of such refusal. . . ." Time for appeal.

The appellant must leave at the Divorce Registry three office copies of the order from which it is desired to appeal, with three notices of appeal. The appeal is then entered in a book kept at the Divorce Registry, and a copy of the entry forwarded to the proper officer of the High Court, who is responsible for the lists of appeals. Practice; documents to be left at registry.

Appeal.

FEES.

Fees.		£	s.	d.
	Entering appeal	2	0	0
	For judgment	1	0	0
	Filing notice	0	2	6

Costs allowed. [For costs allowed on taxation, see post, pp. 540—603.]

Practice at
Royal Courts.

When the notice of appeal has been sent from the Divorce Registry to the Royal Courts of Justice, the proceedings are continued there, and practitioners will do well to inquire of the clerk of the Court of Appeal what course they should pursue.

They will be treated with the utmost courtesy and every possible information will be given them.

Searching in
Room 136.

A book containing entries of the various appeals is kept at the Royal Courts, Room 136, and it is only by searching this book and by constant inquiry that solicitors can ascertain when their appeals are likely to come on.

Documents to
be left by
solicitor at
Royal Courts.

Solicitors must supply the Court with notice of the application, and a copy of the order or decree appealed from. If there are any pleadings, copies of these should be supplied to the clerks to the Lords Justices.

Appeals from
justices.

By sect. 11 of the Summary Jurisdiction (Married Women) Act, 1895 (*ante*, p. 215), an appeal is given from the decisions of magistrates under the Act to the Probate, Divorce, and Admiralty Division.

[See this Act in full, and on this subject generally, Part I., Chap. XIV., *ante*, pp. 212—222.]

By the Mat. C. Act, 1878, s. 4, repealed by the above Act, an appeal was also given to a Divisional Court of the Probate, Divorce, and Admiralty Division, and the practice regulating such appeals has been followed since the passing of the Act of 1895.

Practice,
Ord. LIX.
r. 4a.

By Order LIX. r. 4a, "Appeals from orders made under sect. 4 of the Matrimonial Causes Act, 1878, shall be heard by a Divisional Court of the Probate, Divorce,

and Admiralty Division. Rules 7, 8, 10, 11, 12, and 16 of this Order shall apply to such appeals, the words 'Divorce Registry' being deemed to be substituted in rule 11 for the words 'Crown Office Department of the Central Office.'"

Appeal.

By rule 7, "On any motion by way of appeal from an inferior Court, the Court to which any such appeal may be brought shall have power to draw all inferences of fact which might have been drawn in the Court below, and to give any judgment and make any order which ought to have been made. No such motion shall succeed on the ground merely of misdirection or improper reception or rejection of evidence, unless, in the opinion of the Court, substantial wrong or miscarriage has been thereby occasioned in the Court below."

Ord. LIX.
r. 7.

Power of
Court to draw
inferences of
fact and make
any order.

From
justices;
practice.

[On appeal from justices, the Divisional Court has power, under Ord. LIX. rr. 4a and 7, to make a fresh order: *Brown v. Brown* (1898), 79 L. T. 102.]

By rule 8, "On any motion by way of an appeal from an inferior Court, the Court to which any such appeal may be brought shall have power, if the notes of the Judge of such inferior Court are not produced, to hear and determine such appeal upon any other evidence or statement of what occurred before such Judge which the Court may deem sufficient."

Ibid. r. 8.

Evidence
from Court
below.

[On appeal from justices, two copies of the notes of evidence should be sent for the use of the Court: *Walton v. Walton*, (1900) P. 147; 69 L. J. P. 54; 82 L. T. 627.

Two copies
of depositions
to be supplied
for use of
Divisional
Court.

For the decisions of the Court as to the duty of the magistrate's clerk to supply copies of the depositions to the Court above, see ante, p. 221.]

By rule 10, "Every such appeal shall be by notice of motion, and no rule *nisi* or order to show cause shall be necessary. The notice of motion shall state the grounds of the appeal, and whether all or part only of the judgment, order, or finding is complained of. The notice of

Ibid. r. 10.

Appeal must
be by notice
of motion.

Appeal.

Ord. LIX.

r. 11.

Appeal to be
entered at
Divorce
Registry.

motion shall be an eight days' notice, and shall be served on every party directly affected by the appeal entered."

By rule 11, "Every appeal shall be entered at the Crown Office Department of the Central Office, and the entry shall be made by lodging a copy of the notice."

[For the words "Crown Office Department" read "Divorce Registry." See rule 4a, supra.]

Ibid. r. 12.Service of
notice of
motion.

By rule 12, "The notice of motion shall be served, and the appeal entered within twenty-one days from the date of the judgment, order, or finding complained of; such period shall be calculated from the time at which the judgment or order is signed, entered, or otherwise perfected, or from the time at which the finding or any refusal is made or given."

Ibid. r. 16.Power
to extend
time for
appeal.

And by rule 16, "The High Court shall have power to extend the time for appealing, or to amend the grounds of appeal, or to make any other order, on such terms as the Court shall think just, to ensure the determination on the merits of the real questions in controversy between the parties."

Notice of
motion must
state grounds
of appeal.Documents
to be filed.

The notice of motion must state the grounds of the appeal, and whether all or part only of the justices' order is appealed against. It must appear on the face of it to be an eight days' notice. File a copy of this notice in the Divorce Registry, and with it any affidavits it is proposed to use, and two copies of the depositions.

Fees.**FEES.**

	£	s.	d.
Filing notice	0	2	6
Each affidavit	0	2	6

Order of
justices to
be left in
Divorce
Registry.Copy of notice
should be filed

Two copies of the order appealed against, one of which at least must be certified, should also be left at the Divorce Registry.

A copy of the notice should be filed in the Registry at

least four days before the sitting of the Divisional Court. This is generally on the first Tuesday in every month; but due notice of such sittings is always given.

The notice of motion must be served on every party directly affected by the appeal.

Copies of the affidavits filed in support should be given with the notice to the parties served in order that they may have the opportunity of answering them.

The time for appeal may be extended by the Court.

Appeal.

in registry at least four days before sitting of Divisional Court.

Notice of motion; on whom served.

Copies of affidavits should be delivered in good time to opposite side.

Time for appeal may be extended.

The following form of notice is suggested as a precedent:—

Suggested form of notice.

FORM 109.

Notice of Appeal from Justices.

Notice of appeal, form of.

W. W. v. S. W.

Appeal from an order of the Honble. J. De G.,
Metropolitan Police Magistrate, made on the
day of , 19 .

Take notice that the Divisional Court of the Probate, Divorce, and Admiralty Division of His Majesty's High Court of Justice will be moved on the day of , 19 , at 10.30 o'clock in the forenoon, or as soon after as counsel may be heard, by Mr. , of , counsel on behalf of the above-named W. W., by way of appeal from an order of the above-named metropolitan magistrate, made on the day of , 19 , whereby the said W. W. was convicted of (*here state the offence of which the appellant was convicted*), and the said W. W. was ordered to (*set out terms of order*). The grounds of appeal are as follows (*state grounds of appeal*).

Dated, &c.

To the petitioners, B. & J.,

225, Coleman Street, E.C.,

Solicitors for the above-named S. W.

Practice as to Costs.

COSTS.

Practice as to.

[For the principles on which costs are allowed and disallowed by the Court and for the reported decisions on the subject, see Part I., Chap. XVI., ante, pp. 228—250.]

20 & 21 Vict.
c. 85, s. 51.

Powers of
Court as to
costs.

By sect. 51 of the Matrimonial Causes Act, 1857, “The Court, on the hearing of any suit, proceeding, or petition under this Act, and the House of Lords on the hearing of any appeal under this Act, may make such order as to costs as to such Court or House respectively may seem just: Provided always that there shall be no appeal on the subject of costs only.”

Order unduly
obtained.

By rule 116, “If an order be obtained on motion without due notice to the opposite parties, such order will be rescinded on the application of the parties upon whom the notice should have been served; and the expense of and arising from the rescinding of such order shall fall on the party who obtained it, unless the Judge shall otherwise direct.”

Ibid. s. 34.

Power to
condemn
co-respondent
in costs.

By sect. 34, “Whenever in any petition presented by a husband the alleged adulterer shall have been made a co-respondent, and the adultery shall have been established, it shall be lawful for the Court to order the adulterer to pay the whole or any part of the costs of the proceedings.”

Co-respondent applying
for security
where petitioner abroad.

[For a case where an application by a co-respondent that the petitioner be ordered to give security for his costs was made and refused, see *Redfern v. Redfern, Herbert and others* (1890), 63 L. T. 780.]

Ibid. s. 54.
Power of
Court to fix

By sect. 54, “The Court shall have full power to fix and regulate from time to time the fees payable upon all

proceedings before it; all which fees shall be received, paid, and applied as herein directed: Provided always, that the said Court may make such rules and regulations as it may deem necessary and expedient for enabling persons to sue in the said Court *in formâ pauperis*."

[*For the rules and practice as to suing in formâ pauperis, see ante, pp. 389—395.*]

By sect. 13 of the Matrimonial Causes Act, 1858, "The bill of any . . . solicitor, for any fees, charges, or disbursements in respect of any business transacted in the Court for Divorce and Matrimonial Causes, and whether the same was transacted before the full Court or before the Judge Ordinary, shall, as well between . . . solicitor and client, as between party and party, be subject to taxation by any one of the registrars belonging to the principal registry of the Court of Probate; and the mode in which any such bill shall be referred for taxation, and by whom the costs of taxation shall be paid, shall be regulated by the rules and orders to be made under the Act of the twentieth and twenty-first of Victoria, chapter eighty-five; and the certificate of the registrar of the amount at which such bill is taxed shall be subject to appeal to the judge of the said Court."

By sect. 2 of the Matrimonial Causes Act, 1878, "Where the *Queen's Proctor* or any other person shall intervene or show cause against a decree *nisi* in any suit or proceeding for divorce or for nullity of marriage, the Court may make such order as to the costs of the *Queen's Proctor*, or of any other person who shall intervene or show cause as aforesaid, or of all and every party or parties thereto, occasioned by such intervention or showing cause as aforesaid, as may seem just; and the *Queen's Proctor*, any other person as aforesaid, and such party or parties shall be entitled to recover such costs in like manner as in other cases: Provided that the Treasury may, if it

Costs.
and regulate
fees.

Mat. C. Act,
1858 (21 & 22
Vict. c. 108),
s. 13.

Solicitors'
bills to be
subject to
taxation.

Mat. C. Act,
1878 (41 & 42
Vict. c. 19),
s. 2.

Queen's
Proctor may
be condemned
in costs.

Costs.

shall think fit, order any costs which the Queen's Proctor shall, by any order of the Court made under this section, pay to the said party or parties, to be deemed to be part of the expenses of his office."

Pauper
petitioner
neglecting
to proceed.

By rule 27, "Where a husband admitted to sue as a pauper neglects to proceed in a cause, he may be called upon by summons to show cause why he should not pay costs, though he has not been dispaupered, and why all further proceedings should not be stayed until such costs be paid."

[*For the practice in pauper causes, see ante, pp. 389—395.*

As to costs in pauper causes, see *Richardson v. Richardson and Plowman*, (1895) P. 346; 64 L. J. P. 119; 73 L. T. 135; 11 R. 663.]

Respondents
may be heard
as to costs
without
answering.

By rule 50, "Either of the respondents in the cause, after entering an appearance, without filing an answer to the petition in the principal cause, may be heard in respect of any question as to costs, and a respondent, who is husband or wife of the petitioner, may be heard also in respect to any question as to custody of children, but a respondent who may be so heard is not at liberty to bring in affidavits touching matters in issue in the principal cause, and no such affidavits can be read or made use of as evidence in the cause."

Wife's costs
to setting
order for
trial.

By rule 158, on entering a cause for trial, "or in an earlier stage of a cause by order of the judge or of the registrars, to be obtained on summons, a wife who is petitioner, or has entered an appearance as respondent in a cause, may file her bill or bills of costs for taxation as against her husband, and the registrar to whom such bills of costs are referred for taxation shall, when directions as to the mode of hearing or trial have been given (*now when the cause is set down, motion for directions having been abolished*), ascertain what is a sufficient sum of money to be paid into the registry, or what is a sufficient security, to be given by the husband to cover the costs of the wife

Further
order for
wife's costs.

of and incidental to the hearing of the cause; and shall thereupon issue an order upon the husband to pay or secure the said sum within a time to be fixed by the registrar; provided that in case the husband should by reason of his wife having separate property, or for other reasons, dispute her right to recover any costs pending suit against him, the registrar may suspend the order to pay the wife's taxed costs, or to pay or secure the sum ascertained to be sufficient to cover her costs of and incidental to the hearing of the cause, for such length of time as shall seem to him necessary to enable the husband to obtain the decision of the Court as to his liability."

[See *Sopwith v. Sopwith* (1860), 2 S. & T. 105; 29 L. J. P. 132; *Glennie v. Glennie and Bowles* (1863), 3 S. & T. 109; 32 L. J. P. 17; 7 L. T. 696; see *post*, p. 564; *Gough v. Gough and Baynton* (1864), 33 L. J. P. 136.]

The wife's solicitor, in order that he may secure the full advantage of this rule, should take care always to have his bill ready for taxation at the earliest possible moment, which by the present practice is as soon as the cause is set down for hearing or trial.

He should also at the time of such taxation, apply to the registrar, under rule 158, to fix the amount to be paid into Court or secured to cover the costs of the hearing as, if not made then, the application may be overlooked till it is too late.

Where the wife's defence is a simple denial of the adultery, she may be called upon to support her application by an affidavit or affidavits of herself and her solicitor stating that her defence is *bonâ fide*. For it must be borne in mind that the registrar is not bound to order payment of the wife's costs taxed up to time of setting down for trial, but he can, if he thinks the circumstances of the case warrant him in doing so, order them to be paid into Court or secured, in the same manner as the further

Costs.

Further order for wife's costs.

Wife's solicitor should bring in bill of costs to setting down for hearing for taxation as soon as possible.

Order to pay or secure further amount should be applied for at same time.

Where wife's defence simple denial, may be called on for affidavits as to *bona fides*.

Registrar not bound to order payment of taxed costs to setting down for hearing.

Costs.

May order husband to "pay or secure":

or where husband disputes liability under s. 158

may suspend order for payment until decision of Court.

Information to be supplied to registrar to enable him to fix amount to be paid or secured.

Order to pay into Court within seven days, or to give bond with two sureties for double the amount.

Forty-eight hours' notice as to sureties.

Further order, application for, where expenses likely to be greater than anticipated.

Long trial: application in Court for further order for wife's costs.

Service of copy of order, endorsement on.

Enforcing order to pay or secure.

amount fixed to cover the wife's costs of the hearing. This course is commonly adopted when the husband, under rule 158, disputes the wife's right to recover any costs against him pending suit, and the registrar suspends the order for payment of costs for a time in order that the husband may obtain the decision of the Court upon the matter.

The wife's solicitor must supply the registrar with all necessary information to enable him to estimate the probable cost of the trial, such as the length of the brief, the number of witnesses, the distance they will have to travel, their positions in life, that he may estimate the proper amounts to allow them for expenses, and generally any other particulars that may be of importance.

As soon as the amount is fixed the registrar orders it to be paid into Court within seven days, or that the husband give a bond, with two sureties, for double the amount. The husband must give the wife's solicitor forty-eight hours' notice who the sureties are to be, in order that he may satisfy himself as to their sufficiency and object to them, if he desires to do so. If it subsequently appears that the expenses of the trial are likely to be heavier than was anticipated, a further order can be applied for.

When a hearing or trial lasts longer than was anticipated, the wife's counsel applies to the judge for a further order, and, if the application is granted, the registrar fixes the amount to be paid into Court until such further order. Fees, 10s. per hour or part of hour; order, 5s.

A copy of the order must be served on the husband's solicitor, or on the husband if he is conducting his case in person. This copy must be specially indorsed with a warning that the husband is liable to a writ of execution if the order is disobeyed.

[For the terms of such endorsement and for the manner in which the order is enforced, see post, title "Enforcing Decrees and Orders," p. 638.]

Where the wife is the respondent the order operates at once as a stay of proceedings, and if through the negligence of the wife's solicitor the cause is already in the list for hearing, it is marked as stayed in the cause list, and, if the order is not complied with within the time specified in it, the cause cannot come on for ten days after notice has been given to the clerk of the rules that it has been complied with.

Costs.
Stay of proceedings.
Where wife respondent.

Where the wife is the petitioner, she can elect whether the order for her costs shall operate as a stay or not. But if she desires that the cause should be marked as stayed in the cause, she must say so at the time the order is made. Otherwise the application for a stay can only be made on summons.

Ibid. wife petitioner.

When it is desired to remove a stay, notice must be given to the clerk of the rules, and such notice must state the date on which the order was complied with. The stay is then removed, and ten days after the date on which the order was complied with the cause comes on in its turn.

Removing stay.

The payment of money into and out of Court in the Probate, Divorce, and Admiralty Division is now regulated by the Supreme Court Funds Rules, 1894.

By rule 29, "All funds to be paid into or deposited in Court (in the Probate, Divorce, and Admiralty Division) shall be paid or deposited at the Bank of England (Law Courts Branch) . . . to the account of the Paymaster-General for the time being, and on behalf of the Supreme Court of Judicature. . . ."

Funds in Court to be paid into Bank of England.

By rule 28, "In the . . . Probate, Divorce, and Admiralty Division, an order for the payment of money to be acted upon by the paymaster shall be in the Form No. 7 in the Appendix to these Rules, or as nearly as may be, and shall be signed by . . . a registrar. . . ."

Form of order.

By rule 34, "In the Probate, Divorce, and Admiralty Division, a lodgment of funds to the account of the paymaster shall be made upon presentation at the Bank (Law

Lodgment in Court, authority to be signed by registrar.

Costs.

Courts Branch) of an authority signed by or on behalf of a registrar. Such authority shall be issued upon a request signed by or on behalf of the person desiring to make such lodgment. The request shall specify the title of the cause or matter . . . and any particulars of the lodgment which may be necessary, and shall be in the Form No. 12 in the Appendix to these Rules."

Lodgment of funds in Court without personal attendance.

By rule 33, "A request or authority for the issue by the paymaster of a direction for the lodgment of funds in Court may be sent to the paymaster by post, and, if so desired by the person sending the same, the paymaster shall send such direction by post to the address specified by such person."

[This rule enables a lodgment to be made without any personal attendance at the pay office, which was previously necessary.]

Direction for payment by registrar.

By rule 44, "In the Probate, Divorce, and Admiralty Division, when money has been lodged to a security for costs account, under the provisions of rule 26 of Ord. XXXI. of the Rules of the Supreme Court, 1883, a direction for payment shall be issued by the paymaster upon receipt of a certificate or other authority of a registrar as to the person entitled to payment of the money so lodged."

Authenticated copy of order to be left at pay office.

By rule 46, "A duly authenticated copy of every order in the . . . Probate, Divorce, and Admiralty Division, which directs funds to be dealt with, shall be left at the pay office by or on behalf of the person entitled to payment or interested in any other dealings with such funds directed or authorized by the order, and shall be the paymaster's authority for the issue of directions giving effect to such orders."

[For fuller particulars of these Rules and Appendix, see "The Annual Practice."]

Court has power to order husband to give security for wife's costs

Notwithstanding words of sect. 26 of Matrimonial Causes Act, 1857, and construction thereof by Court of Appeal (*In*

re Wingfield and Blew, (1904) 2 Ch. 665; 73 L. J. Ch. 797; 91 L. T. 783), the Divorce Court has power to order husband whose wife has obtained a separation order against him, to give security for her costs, for the purpose of enabling her to sue for dissolution against him: *Sheppard v. Sheppard*, (1905) P. 185; 74 L. J. P. 102; 93 L. T. 443.]

Costs.

in a suit for dissolution, though she has already obtained a separation order against him.

APPENDIX TO SUPREME COURT FUNDS RULES, 1894.

FORM No. 7.

**Order for Payment in Probate, Divorce, and Admiralty
Division, referred to in Rule 28.**

Order for
payment.

High Court of Justice,
Probate, Divorce, and Admiralty Division.

Title of cause, A. v. B.

Ledger credit No. of cause .
Date, 19 .

The Paymaster-General is hereby directed to make the payments specified below, out of the money standing in his books to the credit of the above cause.

Name of the Person to whom, and also of the Person (if any) upon whose authority payment is to be made.		Particulars.	Amount to be paid.
Person to be paid. (<i>Christian name to precede surname.</i>)			£ s. d.

[*Total amount in words.*]

[*Signature.*]

Costs.

Request for
lodgment.

FORM 12.

**Request for Lodgment in Probate, Divorce, and
Admiralty Division, referred to in Rule 34.**High Court of Justice,
Probate, Divorce, and Admiralty Division.*I. Request for Authority for Lodgment.*

Title of cause, A. v. B.

Lodgment credit No. of cause .
To the registrar,I request authority for the lodgment of £ at the
Bank of England, such lodgment being for *[* *State here such particulars as may be required.*]

(Signature.)

Authority for
lodgment.*II. Authority for Lodgment.*To the agent of the Bank of England (Law Courts
Branch).Please receive the above sum, and place it to the account
of the Paymaster-General, for the time being, for and on
behalf of the Supreme Court of Judicature.

Date, 19 (Signature.)

III. Bank Certificate of Receipt.

To the Assistant Paymaster-General.

Bank of England, 19

The above-stated sum has been this day received.

(Signature.)

FORM 14 (C).

Costs.

Certificate as to Person entitled to Money Lodged "as Security for Costs," referred to in Rule 44. Certificate as to person entitled to money lodged.

High Court of Justice,

Probate, Divorce, and Admiralty Division.

Title of cause in which the }
money was first lodged } A. v. B.

No. of cause .

Ledger credit (*if same as title of cause, state "as above"*).

In pursuance of rule 44 of the Supreme Court Funds Rules, and rule 27A of Ord. XXXI. of the Rules of the Supreme Court, October, 1884, I certify that (*name of person to be paid, and whether party or solicitor*) is entitled to the payment of the total sum of £ , lodged in Court in the above cause as under, by or on behalf of the petitioner (*or respondent*) to a security for costs account under rule 26 or Ord. XXXI. of the Rules of the Supreme Court, 1883, viz.:—

On , 19 , £ .

On , 19 , £ .

Dated this day of , 19 .

(*Signature of registrar.*)

N.B.—The person applying for payment may be required to produce the receipt of the Bank of England for the payment of the amount.

By rule 159, "When on the hearing or trial of a cause the decision of the judge or the verdict of the jury is against the wife, no costs of the wife of and incidental to such hearing or trial shall be allowed as against the husband, except such as shall be applied for, and ordered to be allowed by the judge, at the time of such hearing or trial." Costs of the wife must be asked for at the hearing.

[This rule applies to suits for judicial separation: *Jones v. Jones* (1872), L. R. 2 P. & D. 333; 41 L. J. P. 53; 26 Rule 159 applies to

Costs.

judicial
separation.

Application
for wife's
costs after
trial.

Full costs,
unsuccessful
wife.

Wife who is
unsuccessful, if
she obtains the
order of the
judge at the
hearing or trial
for amount of
costs ordered to
be paid into
Court or secured
can also obtain
immediate pay-
ment of such
costs, subject
to taxation.

Except as
above, no
costs paid
wife until
after decree
absolute.

Counsel must
ask for wife's
costs at
hearing.

"Usual
order" for
wife's costs,
what is.

Amount
estimated by
registrar in
excess of
taxed costs.

Husband
entitled to
balance.

L. T. 106. In spite of the provisions of this rule, the Court has, under very special circumstances, entertained an application for a wife's costs made after the time of hearing or trial: *Somerville v. Somerville and Webb* (1867), 36 L. J. P. 87; 16 L. T. 466. As to asking for unsuccessful wife's full costs of trial, see *Smith v. Smith, Major, Child and Rabett* (1877), 7 P. D. 84; 51 L. J. P. 31; 46 L. T. 696; *Robertson v. Robertson* (1876), 6 P. D. 119; 51 L. J. P. 5; 45 L. T. 237; see *post*, p. 564.]

And by the latter part of rule 201, "a wife who is unsuccessful in a cause, and who at the hearing of the cause has, in pursuance of rule 159, obtained an order of the judge that her costs of and incidental to the hearing or trial of the cause shall be allowed against her husband to the extent of the sum paid or secured by him to cover such costs, may . . . proceed at once to obtain payment of such costs, after allowance thereof on taxation."

[*For this rule in full, see post, p. 562.*]

Except as above, persons condemned in costs are not obliged to pay until after decree absolute.

Solicitors must therefore see that counsel ask for the wife's costs at the hearing, where she is unsuccessful.

The ordinary practice is for counsel to ask for "the usual order for the wife's costs." Such usual order is that the amount paid in or secured is ordered to be paid out, after deducting any sum or sums that may be taxed off by the registrar. This simply means that if the amount estimated by the registrar at the time of setting down for hearing is actually more than the wife's full costs would have amounted to had she been successful, the husband is entitled to the benefit of any balance there may be. But this happens comparatively rarely, for as a rule the amount fixed by the registrar is rather under than over the mark; therefore the husband's solicitors frequently agree to the amount of the costs as estimated, and taxation is dispensed with.

Sometimes, under special circumstances, the full costs, or at all events an amount larger than the amount paid into Court and secured is asked for at the hearing or trial, and obtained. (See *Smith v. Smith, Major, Child, and Rabett* (1877), 7 P. D. 84; 51 L. J. P. 31; 46 L. T. 696; see *post*, p. 564; *Robertson v. Robertson* (1876), 6 P. D. 119; 51 L. J. P. 5; 45 L. T. 237.)

In any case the order for costs forms part of the decree *nisi*.

Where the wife succeeds, the decree simply condemns the husband in her costs, which are duly taxed, and the order for payment specifies the mode in which such payment is to be made. The usual practice is to order the amount estimated by the registrar, which has already been paid into Court or secured, to be paid out at once to the wife, and such further amount as may be allowed her to be paid into Court or secured until the decree has been made absolute.

[Where a jury disagreed, the Court gave the wife her full costs over and above the amount deposited in Court: *Hurley v. Hurley and Menzies*, (1891) P. 367; 61 L. J. P. 14; 65 L. T. 353.]

The Court can, if it thinks right, refuse to give the wife any costs at all, and there is no appeal against its decision.

[See *ante*, p. 526.]

If after taxation of the wife's costs it turns out that the amount estimated by the registrar is in excess of the amount allowed on taxation, the husband is not entitled to have the balance refunded to him until after decree absolute, *except by consent*.

If the husband chooses to pay the wife's taxed costs he can do so, and then take out a summons to show cause why the amount paid into Court should not be paid out to him. Or the wife's solicitor can, after taxation, obtain the order for payment out of the fund in Court.

Costs.

Amount larger than amount paid in or secured, asked for at trial and obtained.

Order for costs forms part of decree *nisi*.
Wife successful.

Practice as to payment of costs.

Jury disagreeing, Court gave wife her full costs.

No appeal against refusal of Court to give wife costs.

Amount estimated in excess of wife's costs; husband not entitled to receive balance until after decree absolute, *except by consent*.

Mode of obtaining payment of balance by husband.

Costs.

FORM 110.

Summons for
payment of
wife's costs
and bond for
further
amount,
form of.

**Summons for Payment of Wife's Costs already incurred,
and for Depositing Bond for such further Amount
as ordered by Registrar.**

[*Heading in Cause.*]

To show cause why the petitioner should not, within a week from the service of the order to be made upon this summons, pay or cause to be paid to the respondent's solicitor, R. C. T., the sum of £ , being the amount of the taxed costs incurred on behalf of the respondent to the present time in this suit; and also why the petitioner should not pay or cause to be paid into the Divorce Registry of the said Division, or give security for the sum of £ , being the sum reported by X. Y., Esquire, one of the registrars of the said Division, to be sufficient to answer the expenses of the respondent, of and incident to the hearing of this cause, together with the costs of this summons.

Wife's costs
of commission
to examine
witnesses.

By rule 137, "In case a husband or wife shall apply for and obtain an order or a commission or requisition for the examination of witnesses, the wife shall be at liberty, without any special order for that purpose, to apply *by summons* to one of the registrars *to ascertain and report to the Court what is a sufficient sum of money to be paid or secured* to the wife to cover her expenses in attending at the examination of such witnesses in pursuance of such order, or in virtue of such commission or requisition, and such sum of money shall be paid or secured before such order or such commission or requisition shall issue from the registry, unless the judge or one of the registrars in his absence shall otherwise direct."

Ibid.

By rule 198, "The registrar to whom a commission or requisition for examination of witnesses is referred for settlement, on application on behalf of the wife, may proceed at once and without summons to ascertain what is a sufficient sum of money to be paid or secured to her to cover her expenses in attending at the examination of such

witnesses, and shall thereupon issue an order upon the husband to pay or secure the said sum within a time to be fixed in such order."

Costs.

[See *Baily v. Baily and Della Rocca* (1860), 2 S. & T. 112; 30 L. J. P. 47. See *post*, p. 564.

These two rules must, of course, be read together.]

By rule 103, in cases of petitions for maintenance or variation of settlements by rule, "The costs of a wife of and arising from the said petition or answer shall not be allowed on taxation of costs against the husband before the final decree in the principal cause without direction of the judge."

Wife's costs of petition for variation of settlements or maintenance.

By rule 199, "The bond taken to secure the costs of a wife of and incidental to the hearing of a cause shall be filed in the registry of the Court of Probate, and shall not be delivered out or be sued upon without the order of the Court."

Bond to secure wife's costs.

The bond is prepared by the husband's solicitor and sent for approval to the wife's solicitor, who is supposed to return it approved within two days. The bond is then engrossed *on paper, not parchment*, and duly executed. The approval of the other side is then endorsed upon it. The registrar's minute for filing is drawn up by the solicitor filing it.

Bond and registrar's minute, how prepared, wife's solicitor approving. Securing wife's costs.

The following two forms are taken from the Appendix to the Official Copy of the Rules and Orders:—

FORM 111.

Official Form of Bond for securing Wife's Costs in Amended Rules, 1875.

Bond for, form of.

Know all men by these presents, that we, A. B., of, &c., G. H., of, &c., and K. L., of, &c., are held and firmly bound unto X. Y., of _____, the proctor or solicitor for _____, of _____, in the penal sum of £200 of good and lawful money of Great Britain, to be paid to the said X. Y., and for which payment to be well and truly made we bind ourselves and each of us for the whole, our heirs,

Costs. executors, or administrators, firmly by these presents.
Ibid. Sealed with our seals.

Dated the day of , in the year of our Lord
 one thousand nine hundred and eleven.

Whereas a certain cause is now depending in the Probate, Divorce, and Admiralty Division of the High Court of Justice between the said A. B., petitioner, of the one part, and the said C. D., respondent, and R. S., co-respondent, of the other part. And whereas by an order made in the said cause, it was ordered that the said A. B., the petitioner (*or* the said C. D., the respondent), should within

days from the service thereof pay or cause to be paid into the Divorce Registry of the said Division the sum of £100 to cover the costs of the said respondent (*or* petitioner) of and incidental to the hearing of the said cause or file in the said registry a bond under the hand and seal of the said A. B., and of two sufficient sureties in the penal sum of £200, conditioned for the payment of such costs of the said C. D. as shall be certified to be due and payable by the said A. B., not exceeding the sum of £100, as security for the costs aforesaid. Now the condition of this obligation is such that if the above-bounden A. B., his heirs, executors, or administrators, shall well and truly pay or cause to be paid to the above-named X. Y., his heirs, executors, administrators, or assigns, the full sum of £100 of good and lawful money of Great Britain, or the lawful costs of the said C. D., the respondent (*or* petitioner), of and incidental to the hearing and trial of this cause to the extent of £100, then this obligation is to be void and of none effect, otherwise to remain in full force and virtue.

Sealed and delivered by the said	A. B. (L.S.)
A. B., G. H., and K. L., in	G. H. (L.S.)
the presence of of .	K. L. (L.S.)

[*One attesting witness.*]

Penalty.

[*Penalty of bond double amount ordered to be paid into Court or secured.*]

FORM 112.

Costs.

**Registrar's Minute on Deposit of Bond of Security for
Wife's Costs.**Registrar's
minute of
bond for
wife's costs,
form of.[*Heading in Cause.*]

The day of , 19 .

Messrs. , of , in the county of , the solicitors for the petitioner (*or* respondent), referring to the order of the President of this Court made in this cause, and bearing date the day of , 19 , whereby it was ordered that the petitioner (*or* respondent) do pay into the Divorce Registry of the Probate, Divorce, and Admiralty Division of His Majesty's High Court of Justice, such sum as may be reported sufficient by one of the registrars of the said Court to cover the expenses of the said respondent (*or* petitioner) of preparing for and on the trial of this cause, or give such security for the said expenses as the said registrar might deem sufficient, brought into and filed in the registry of the said Court a bond under the hands and seals of the said petitioner (*or* respondent) and of two sureties in the penal sum of £ , the sum being the amount of the security reported by , Esquire, one of the registrars of the said Court, sufficient to cover the payment of such expenses of the said respondent (*or* petitioner) as shall be certified to be due and payable, the said report bearing date the day of , 19 .

X. Y., Registrar.

The bond and the minute, when signed by the registrar, are filed by the husband's solicitor in the registry, who should give notice to the wife's solicitor that he has done so.

Filing bond
and minute.

Where the wife's solicitor returns the bond without either approving or disapproving, or fails to return it within the two days required by the practice of the registry, the husband files in the registry a certificate that he has

Wife's solicitor
returning
bond without
approving or
disapproving,
or neglecting

<p>Costs.</p> <p>to return bond within two days.</p> <p>Two days' notice to wife's solicitor of names and addresses of proposed sureties.</p>	<p>duly delivered the draft bond, and then files the bond and registrar's minute as above.</p> <p>Besides delivering the draft bond, the husband's solicitor should give two days' notice to the wife's solicitor of the names and addresses of the persons he proposes as sureties to the bond.</p> <p>Such notice may be more or less in the following form:—</p>
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FORM 113.

Notice of Sureties to Wife's Bond.

Notice of
sureties to
wife's bond,
form of.

[Heading in Cause.]

To Messrs. W. W. & Co., of 66, Frederick's Place,
Old Jewry, E.C., the respondent's solicitors.

Take notice that we tender E. F., of _____, in the
county of _____, innkeeper, and J. K., of _____, in the
county of _____, farmer, as sureties on behalf of the
petitioner for the sum of £ _____, to answer the respon-
dent's costs of and incident to the hearing of this cause.

B. and J.,

225, Coleman Street, E.C., Petitioner's solicitors.
September 3rd, 19 ____.

Wife's
solicitor dis-
approving
bond.

If the wife's solicitor disapproves of the proposed bond,
the husband's solicitor should file in the Divorce Registry
an affidavit, more or less in the following form:—

FORM 114.

Affidavit of Justification of Sureties.

[Heading in Cause.]

Affidavit of
justification
by sureties,
form of.

I, E. F., of _____, in the county of _____, make oath
and say—

1. That I live at _____ aforesaid.
2. That I am willing to become one of the sureties for
the said A. B., for payment of the costs of the

said C. B., which have been incurred or are being incurred in this suit.

Costs.

3. That I am worth more than £ after all my just debts are paid.

Sworn, &c.

Each of the sureties having duly sworn an affidavit in the above form (*or a joint affidavit of both sureties to the same effect*), the husband's solicitor should obtain the registrar's signature to the minute, which with the bond and the above affidavits or affidavit should be duly filed in the registry.

Ibid. to be filed in registry, with bond and minute.

If the wife's solicitor still objects to the proposed security he must take out a summons for the examination of the sureties as to their means. If an order is made on this summons, an appointment must be obtained for the examination and cross-examination of the sureties on oath.

Wife's solicitor still objecting to bond; examination of sureties on oath as to means.

Against the decision of the registrar an appeal of course lies to the judge in chambers.

Appeal from registrar to judge.

[*For the manner of enforcing the bond for the wife's costs, see post, title "Enforcing Decrees and Orders," p. 638.*]

Enforcing bond.

When the costs are paid, the husband's solicitor takes out a summons to show cause why the bond should not be cancelled and given out. But this is generally done by consent.

Cancelling bond.

FORM 115.

Registrar's Minute on Cancelling Bond for Wife's Costs.

Registrar's minute on cancelling bond.

[*Heading in Cause.*]

On , the day of , 19 , before the undersigned registrar of the Probate, Divorce, and Admiralty Division of His Majesty's High Court of Justice:

Referring to the order of the President of this Court, made in this cause on summons and by consent, and bearing date the day of , 19 , whereby it was

Costs. ordered that the bond given herein by the petitioner and his sureties as security for the respondent's costs in this cause be cancelled, the same having been satisfied: The undersigned registrar of the principal registry of the Probate, Divorce, and Admiralty Division of His Majesty's High Court of Justice, having been attended by the solicitor for the petitioner, and acting in pursuance of the aforesaid order, cancelled the said bond and directed this minute cancelling the same to be entered in the Court books and filed.

, 19 .

X. Y., Registrar.

Receipt for bond.

[*A receipt is given for the bond: fee 2s. 6d.*]

Change of solicitor.

By rule 127, "A party may obtain an order to change his or her . . . solicitor upon application by summons to the registrar."

Ibid.

And by rule 128, "In case the former solicitor neglects to file his bill of costs for taxation at the time required by the order served upon him, the party may, with the sanction and by order of the judge or of the registrars, proceed in the cause by the new proctor, solicitor, or attorney, without previous payment of such costs."

Present practice as to.

The above (omitting unnecessary words) are rules 127, 128, as they still stand, apparently unrepealed. The practice, however, which has prevailed for some years is that any party to a cause shall be at liberty to change his or her solicitor, without an order for that purpose, upon notice of such change, containing an address for service of pleadings and other instruments within three miles of the General Post Office, being filed in the registry, but until such notice is filed and a copy thereof served on the other parties in the cause, the former solicitor shall be considered the solicitor of the party.

Filing notice.

Delivery of papers.

The usual filing fee, 2s. 6d., is paid on filing this notice, and any application necessary for delivery of papers must be made by summons.

Any form of notice, provided it is clear, will suffice.
The following form is only a suggestion:—

Costs.

FORM 116.

Notice of Change of Solicitors.

Notice of
change of
solicitors,
form of.

Take notice, that we, the undersigned, have been appointed to act as solicitors for the petitioner (*or respondent, or as the case may be*) in the above cause, in the place of A. B., who has ceased to act for the said petitioner (*or as the case may be*);

or,

“in the place of A. B., now deceased.”

Former
solicitor
dead.

or,

“in the place of A. B., who has retired from business, and whose business has been transferred and assigned to us;”

Ibid. retired
from business.

or,

“to act for the petitioner (*or as the case may be*), who, having entered an appearance in person, desires now to be represented by a solicitor.”

For party
previously
“in person.”

(Signed) W. W. & Co.,

66, Frederick's Place, Old Jewry, E.C.

To the Divorce Registrars of the

Probate, Divorce, and Admiralty Division.

A copy of the notice should be sent to the solicitors for the opposite party or parties, or to such parties themselves if they happen to be conducting their cases in person.

Copy notice
to be sent to
opposite
party.

The outgoing solicitor can file his bill for taxation without an order.

Outgoing
solicitor files
bill of costs
without order.
Ibid. acting
for wife.

Where the outgoing solicitor is acting for the wife, the wife's costs are taxed as between party and party and also as between solicitor and client, the husband being only liable for such costs (at all events, in the Divorce Court) as between party and party.

[For fees and costs allowed on taxation, see post, pp. 540—603.]

Costs. By rule 151, "All bills of costs are referred to the registrars of the principal registry of the Court of Probate for taxation, and may be taxed by them, without any special order for that purpose. Such bills are to be filed in the registry."

[This rule applies only to bills in divorce proceedings. Sometimes bills are referred to the registrars from other Courts, in which case they are not filed, only left in the registry.]

Appointment for taxation. By rule 177, "In all cases in which the Court at the hearing of a cause condemns any party to the suit in costs, the solicitor of the party to whom such costs are to be paid may forthwith file his bill of costs in the registry, and obtain an appointment for the taxation, provided that such taxation shall not take place before the time allowed for moving for a new trial or re-hearing shall have expired; or, in case a rule *nisi* should have been granted, until the rule is disposed of, unless the judge shall, for cause shown, direct a more speedy taxation."

Early appointment for taxation. *[Early appointments for taxation are sometimes given in urgent cases, but only for good and weighty reasons.]*

Notice of appointment. By rule 152, "Notice of the time appointed for taxation will be forwarded to the party filing the bill at the address furnished by such party."

[The notice of appointment is drawn up in the registry and states the day and hour of taxation.]

Notice to other side and copy bill. By rule 153, "The party who has obtained an appointment to tax a bill of costs shall give the other party or parties to be heard on the taxation thereof at least one clear day's notice of such appointment, and shall at or before the same time deliver to him or them a copy of the bill to be taxed."

[It is always better to give a longer notice, if possible.]

By rule 154, "When an appointment has been made by a registrar of the Court of Probate for taxing any bill of costs, and any parties to be heard on the taxation do not attend at the time appointed, the registrar may nevertheless proceed to tax the bill after the expiration of a quarter of an hour, upon being satisfied by affidavit that the parties not in attendance had due notice of the time appointed."

Costs.
Parties not attending.

By rule 155, "The bill of costs of any solicitor will be taxed on his application as against his client, after sufficient notice given to the person or persons liable for the payment thereof, or on the application of such person or persons, after sufficient notice given to the practitioner."

Taxing between solicitor and client.

By rule 156, "The fees payable on the taxation of any bill of costs shall be paid by the party on whose application the bill is taxed, and shall be allowed as part of such bill; but if more than one-sixth of the amount of any bill of costs taxed as between practitioner and client is disallowed on the taxation thereof, no costs incurred in such taxation shall be allowed as part of such bill."

Fees, by whom paid.

If one-sixth disallowed.

By rule 200, "If more than one-sixth of the amount of any bill of costs, taxed as between practitioner and client, is disallowed on taxation thereof, the party on whose application the bill is taxed shall be at liberty to deduct the costs incurred by him in the taxation from the amount of the bill as taxed, if so much remains due, otherwise the same shall be paid by the practitioner to the person on whose application the bill is taxed."

Amending R. 156.
As to cases where one-sixth of bill taxed off.

[These two rules must, of course, be read together; for fees and costs, see post, pp. 566—603.]

Fees.

By rule 157, "If an order for payment of costs is required, the same may be obtained by summons on the amount of such costs being certified by the registrar."

Order for payment.

[See also rules 178, 179 and 201.]

Costs. By rule 178, "Upon the registrar's certificate of costs being signed, he shall at once issue an order of the Court for payment of the amount within seven days."

Ibid. By rule 179, "This order shall be served on the solicitor of the party liable [or, if it is desired to enforce the order by attachment, on the party himself], and if the costs be not paid within the seven days a writ of *fieri facias* or writ of sequestration shall be issued as of course in the registry, upon an affidavit of service of the order and non-payment."

[See post, title "*Enforcing Orders*," p. 638.]

Order to pay, when made before decree absolute. By rule 201, "The order for payment of costs of suit, in which a respondent or co-respondent has been condemned by a decree *nisi*, shall, if applied for before the decree *nisi* is made absolute, direct the payment thereof into the registry of the Court of Probate, and such costs shall not be paid out of the said registry to the party entitled to receive them under the decree *nisi* until the decree absolute has been obtained; but a wife who is unsuccessful in a cause, and who at the hearing of the cause has, in pursuance of rule 159, obtained an order of the judge that her costs of and incidental to the hearing or trial of the cause shall be allowed against her husband to the extent of the sum paid or secured by him to cover such costs, may nevertheless proceed at once to obtain payment of such costs, after allowance thereof on taxation."

Stay. [These four rules must be read together. If a stay of proceedings is desired, it can form part of the order.]

When petition dismissed. By rule 193, "When an order has been made for the dismissal of a petition on payment of costs, the cause will not be removed from the list of causes in the Court books without an order of one of the registrars, to obtain which it must be shown to his satisfaction that the costs have been paid."

Mat. C. Act, 1884. Rules 214 and 215 were made to carry out the pro-

visions as to alimony and maintenance of the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68) (see *ante*, pp. 84—86), passed to amend the law as to restitution of conjugal rights, which confers special powers on the Court of making provision for a wife in these suits.

[*Rules 216, 217, 218, relate entirely to costs. See post, p. 566.*]

All particulars, such as vouchers by counsel, receipts for money out of pocket, &c., and all documents, such as briefs, &c., should be before the registrar to assist him in his taxation.

Costs.

Registrar should have full particulars of items before him at taxation.

After the taxation the parties can compare their copy bills with the taxed bill, agree the amount, and return the taxed bill to the registrar.

Solicitors agreeing amount of taxed costs.

A party objecting to the taxation should bring in a statement of the items objected to and leave it with the registrar. An appeal from the registrar lies by a summons before the judge in chambers.

Objections to taxation, appeal to judge in chambers.

No costs are allowed on taxation to a party ordered to give particulars, or for amending pleadings by striking out charges after a summons for particulars, or generally for amending pleadings, even where the facts necessitating the amendment were not within the knowledge of the party at the time the pleading was filed, *except under very special circumstances*.

Amounts usually disallowed.

Bills of costs are not taxed by the registrars during the vacation, "except under special circumstances to be stated in a written application addressed to them."

Taxation of.

[*But practitioners should bear in mind that "retainers" to counsel are still always allowed on taxation in matrimonial causes.*]

Retainers always allowed on taxation in matrimonial causes.

The following reported decisions relate entirely to practice as to costs, and, on that ground, are given here instead of in Chap. XVI. (*ante*, Part I., pp. 228—250):—

[The general principles on which costs are taxed against a husband are the same in matrimonial as in other causes: see

Taxation, general principles of.

Costs.

Solicitor should see sufficient amount fixed to cover wife's costs of hearing.

Solicitor should file bill for wife's costs early.
Nullity, costs of wife.

Asking for full costs of guilty wife.

Husband infant: taxing wife's costs against guardian.

Money paid in by husband for wife's costs: primarily liable, though co-respondent condemned in costs.
Wife's costs of commission to examine witness.

Husband dying after paying in money for wife's costs.

Unfounded

Suggate v. Suggate (1859), 1 S. & T. 497; *Harding v. Harding and Lance* (1862), 2 S. & T. 549; 31 L. J. P. 76; 6 L. T. 692; *Hepworth v. Hepworth* (1860), 30 L. J. P. 253; 3 L. T. 180. The solicitor should be careful to see that a sufficient amount is fixed by the registrar to meet her costs of hearing: see *Sopwith v. Sopwith* (1860), 2 S. & T. 105; 29 L. J. P. 132; *Glennie v. Glennie and Bowles* (1863), 3 S. & T. 109; 32 L. J. P. 17; 7 L. T. 696; *Gough v. Gough and Baynton* (1864), 33 L. J. P. 136. If the amount fixed is insufficient a summons should be taken out before the judge: *Madan v. Madan and De Thoren* (1868), 18 L. T. 337. The solicitor must see that there is no undue delay in filing the wife's costs of hearing for taxation, otherwise there may be a difficulty about security: *Bridgman v. Bridgman and Puckrin* (1869), 20 L. T. 87. The rule as to taxation of the wife's costs up to trial is only applicable against a husband, not against a third person instituting a suit for nullity against both husband and wife: *Wells v. Cottam (falsely called Wells)* (1863), 3 S. & T. 364; 33 L. J. P. 72; 10 L. T. 138. On the subject of asking at the hearing for the full costs of a guilty wife, see *Smith v. Smith, Major, Child and Rabett* (1877), 7 P.D. 84; 51 L. J. P. 31; 46 L. T. 696; *Robertson v. Robertson* (1876), 6 P.D. 119; 51 L. J. P. 5; 45 L. T. 237. Where a husband is an infant, the wife has a right to tax her costs against his guardian: *Beavan v. Beavan* (1862), 2 S. & T. 652; 31 L. J. P. 166; 7 L. T. 435.

Money paid into Court by a husband to meet his wife's costs is primarily liable for such costs, although the co-respondent has been condemned in costs: *Hall v. Hall* (1864), 3 S. & T. 390; *Evans v. Evans and Robinson* (1859), 1 S. & T. 328; 28 L. J. P. 136. Where a commission for the examination of witnesses out of the jurisdiction is ordered, the registrar fixes a sum to be advanced by the husband, to cover the wife's costs: *Baily v. Baily and Della Rocca* (1860), 2 S. & T. 112; 30 L. J. P. 47. Where the husband dies after having paid money into Court to meet the order for his wife's costs but before the hearing, the wife can tax her costs against his executors: *Hall v. Hall* (1864), 3 S. & T. 390; and if, having paid money in as above, the husband dies after decree absolute, the wife can enforce the order for costs against his personal representative: *Hawks v. Hawks and Fenwick* (1876), 1 P.D. 137; 45 L. J. P. 41; 34 L. T. 659. Unfounded countercharges will be disallowed on taxa-

tion: *Wilson v. Wilson* (1872), L. R. 2 P. & D. 435; 41 L. J. P. 74; 27 L. T. 351. The number of witnesses to be allowed on taxation is in the discretion of the registrar: *Allen v. Allen and D'Arcy* (1860), 2 S. & T. 107; 30 L. J. P. 9; 3 L. T. 480; and as to what witnesses should be allowed, see *Allen v. Allen*, *supra*; *Finney v. Finney*, 21 L. T. 597. The fees of counsel for advising on an answer which is special and not a mere traverse, and term refresher fees, will be allowed on taxation: *Hepworth v. Hepworth* (1861), 30 L. J. P. 253; *Stoate v. Stoate* (1861), 30 L. J. P. 214.

The costs of a party's appearance on a motion will not be allowed on taxation where such appearance is unnecessary, although he may have received notice to appear from the opposite side: *Frebout v. Frebout and Penny* (1861), 30 L. J. P. 214; see also *Watts v. Watts* (1861), 31 L. J. P. 29. Where an application should be made by summons, not motion; if made on motion, so much only of the costs as would have been incurred if it had been made on summons will be taxed against the husband: *Higgs v. Higgs and Hopkins* (1862), 32 L. J. P. 64.

The proper mode of reviewing a taxation of costs is by filing objections and taking out a summons before the judge, to show cause why the taxation should not be reviewed; but the Court will not make an order, unless it appears that such taxation was wrong in principle: *Cooke v. Cooke* (1864), 3 S. & T. 374; 33 L. J. P. 79; 10 L. T. 141; see also *Ogilvie v. Massey*.

A wife who has obtained a decree *nisi* with costs, is entitled to enforce payment of those costs from her husband, although the King's Proctor may have intervened, without waiting for the result of such intervention: *Gladstone v. Gladstone* (1875), L. R. 3 P. & D. 260; 44 L. J. P. 46; 32 L. T. 404. The Court has power to condemn in costs a party cited in a proceeding under the Legitimacy Declaration Act, 1858, who is unsuccessful in his opposition: *Bain v. Attorney-General* (Usher intervening), (1892) P. 261; 61 L. J. P. 135; 67 L. T. 447.]

Costs.

charges, costs of, disallowed.

Number of witnesses allowed, matter for registrar.

Fees of counsel for advising on answer.

Costs of appearance on motion.

Application that should be made on summons improperly made on motion.

Reviewing taxation of costs.

Wife's costs. King's Proctor intervening.

Party cited under Legitimacy Act, 1858, may be condemned in costs.

Costs.

The following pages are extracted from Johnson on Bills of Costs, second edition (London: Stevens & Sons, Limited, and Sweet & Maxwell, Limited, 1901), pages 611—648.

RULES OF THE SUPREME COURT.

ADDITIONAL RULES AND REGULATIONS IN DIVORCE AND MATRIMONIAL CAUSES.

The following Rules shall come into operation on the 1st day of January, 1886, and shall apply, so far as may be practicable, to all proceedings on or after that day.

216. In divorce and matrimonial causes solicitors shall be entitled to charge, and be allowed the fees set forth in the column headed "Lower Scale" in Appendix N. annexed to the Rules of the Supreme Court, 1883, so far as the same are applicable to such causes.

217. The fees set forth in the column headed "Higher Scale" in the said Appendix N., so far as the same are applicable, may be allowed either generally in any divorce or matrimonial cause, or as to the costs of any particular application made or business done therein if on special grounds arising out of the nature or importance or the difficulty or urgency of the case, the Court, or a judge, shall at the trial or hearing or further consideration of such a cause, or at the hearing of any application therein,

whether the cause shall or shall not be brought to trial or hearing or to further consideration (as the case may be), so order, or if the taxing registrar, under directions given to him for that purpose by the Court, or a judge, shall think that such allowance ought to be so made upon such special grounds as aforesaid.

218. Upon any reference to the taxing registrar to tax a bill of costs of a solicitor for the purpose of ascertaining the amount due to such solicitor in respect thereof, if such bill shall include charges for business done in any divorce or matrimonial cause, the taxing registrar may allow the fees set forth in the column "Higher Scale" in the said Appendix N., so far as the same are applicable in respect of such cause, or in respect of any particular application made or business done therein, if, on such special grounds as in the last preceding rule mentioned, he shall think that such allowance ought to be so made.

(Signed) HALSBURY, C.
COLERIDGE, C.J.
ESHER, M.R.
JAMES HANNEN, Prest. P.D.A.
NATH. LINDLEY, L.J.
EDW. FRY, L.J.
C. E. POLLOCK, B.
H. MANISTY, J.

December 18th, 1885.

Fees to be taken for their own use by Solicitors of the Supreme Court of Judicature in respect to Divorce and Matrimonial Causes on and after the 1st day of January, 1886.

CITATIONS, SUBPŒNAS, WRITS, SUMMONSES, NOTICES, AND SERVICE OF SAME.

	Old Scale.	Higher Scale.	Lower Scale.
	£ s. d.	£ s. d.	£ s. d.
Citation, including præcipe	0 7 6		
Citation to see proceedings, including præcipe	0 7 6		
Certificate of service	0 2 6		
Subpœna ad testificandum and præcipe.....	.....	0 6 8	0 6 8
Subpœna duces tecum, if 4 folios of 72 words or under, and præcipe .....	.....	0 6 8	0 6 8
If the subpœna exceeds 4 folios in length, for each additional folio of 72 words.....	.....	0 1 4	0 1 4
Writ of attachment, including præcipe.....	.....	0 10 0	0 7 0
Writ of sequestration, including præcipe.....	.....	0 10 0	0 7 0
Summons, including copy for the Court .....	.....	0 8 8	0 5 0
Summons, each copy of, for service .....	.....	0 2 0	0 1 0
Or per folio .....	.....	0 0 4	0 0 4
For preparing notice to produce on the trial, or notice to admit .....	.....	0 7 6	0 5 0
If necessarily long, not exceeding per folio .....	.....	0 1 0	0 0 8
For preparing notice of motion .....	.....	0 5 0	0 3 0
Or per folio .....	.....	0 1 0	0 1 0
For preparing any other notice .....	.....	0 1 6	0 1 6
If necessarily exceeding 3 folios, for each folio beyond 3 .....	.....	0 1 0	0 1 0
For each copy for service .....	.....	0 1 0	0 1 0
Or per folio .....	.....	0 0 4	0 0 4
Personal service of citation, petition, or sub- pœna, or other document, if within 2 miles of the place of business of the practitioner, or of the person employed to effect the service	0 5 0	0 5 0	0 5 0
If beyond that distance, for each mile beyond such 2 miles	0 1 0	0 1 0	0 1 0
Where, in consequence of the distance of the party to be served, it is proper to effect such service through an agent (other than the London agent), for correspondence in addition .....	.....	0 7 0	0 7 0
In cases in which the person to be served shall avoid service, or shall reside beyond the jurisdiction, a sum to be allowed for service according to the circumstances.			
Service, where an appearance has been entered, on the solicitor or party.....	.....	0 2 6	0 2 6

Old Scale.	Higher Scale.	Lower Scale.
£ s. d.	£ s. d.	£ s. d.

INSTRUCTIONS.

Instructions for citations, petitions, answers, or other pleadings, or amendment of pleadings, for interrogatories, special affidavits, or applications for an order for protection of a wife's earnings and property	0 6 8	0 13 4	0 6 8
Ditto to defend suit .....	.....	0 13 4	0 6 8
Ditto for brief, on hearing .....	.....	2 2 0	1 1 0
If there are several witnesses examined, and the brief or case is necessarily long, an additional fee will be allowed.			
Ditto for counsel to make any application to the Court where no other brief .....	.....	0 10 0	0 6 8

PLEADINGS AND PERUSAL.

Drawing and engrossing all petitions and answers, if 10 folios of 72 words or under, including a copy to file	1 0 0		
If exceeding 10 folios, for every additional folio, including a copy to file.....	0 1 4		
Drawing and engrossing replications and other subsequent pleadings .....	.....	0 10 0	0 5 0
Or per folio .....	.....	0 1 0	0 1 0
For case for motion, including fair copy for the Court	0 10 0		
If necessarily more than 7 folios, for every additional folio, including copy for the Court	0 1 4		
Drawing and engrossing demurrer, inclusive of the statement of any matter of law to be argued, for 10 folios of 72 words or under.....	0 10 0		
If exceeding 10 folios of 72 words, for every additional folio of 72 words.....	0 1 0		
Drawing bill of costs, per folio of 72 words, including copy for taxation .....	.....	0 0 8	0 0 8
Drawing any instrument to be filed in or issued by the registry for which no other fee is herein allowed, inclusive of fair copy to be filed or issued, per folio of 72 words..	0 1 4		
For perusing and abstracting pleadings, affidavits, exhibits, and other documents..	.....	0 13 4	0 6 8
Or per folio .....	.....	0 0 4	0 0 4

	Old Scale.	Higher Scale.	Lower Scale.
	£ s. d.	£ s. d.	£ s. d.
COPIES.			
Copies of petitions, answers, and other pleadings, also of exhibits, bills of costs, or other documents, where no other provision is made, at per folio of 72 words.....	.....	0 0 4	0 0 4
If any exhibit or other document to be copied, or any part thereof contains pencil marks or writing, or the copy thereof, or any part thereof, is required to be made fac-simile, in addition to any other fee for the copy:—			
For every folio of pencil marks or writing, or copy fac-simile, or part of a folio	0 0 4		
ATTENDANCES.			
On entering appearance	0 6 8		
To search for appearance to citation	0 6 8		
On counsel with brief, when the fee to counsel is 1 guinea .....	.....	0 6 8	0 3 4
When the fee to counsel exceeds 1 guinea and is under 5 guineas .....	.....	0 6 8	0 6 8
When the fee is 5 guineas or more, but under 20 guineas .....	.....	0 13 4	0 6 8
When the fee is 20 guineas .....	.....	1 1 0	0 13 4
When the fee is 40 guineas or more.....	.....	2 2 0	
On consultation or conference .....	.....	0 13 4	0 13 4
In pursuance of notice to admit .....	.....	0 13 4	0 6 8
Or per hour .....	.....	0 6 8	0 6 8
On trial or hearing when cause is in paper and not tried or heard, or on motion in Court.....	.....	0 10 0	0 10 0
On trial or hearing .....	.....	1 1 0	0 13 4
Or, according to circumstances, not to exceed .....	.....	3 3 0	3 3 0
On taxation of bill of costs .....	.....	0 6 8	0 6 8
Or, according to circumstances, not to exceed .....	.....	2 2 0	2 2 0
Unless very long, when an additional fee will be allowed.			
On examination of witnesses before any examiner, commissioner, officer, or other person .....	.....	0 13 4	0 13 4
Or, according to circumstances, not to exceed .....	.....	2 2 0	2 2 0
Or, if without counsel, not to exceed....	.....	3 3 0	3 3 0
For all necessary attendances in chambers, in the registry, before a commissioner, or counsel, or upon the adverse parties or solicitor, for which no other fee is herein allowed	0 6 8		

	Old Scale.	Higher Scale.	Lower Scale.
£ s. d.	£ s. d.	£ s. d.	£ s. d.
BRIEFS, CASES FOR HEARING, TERM FEES, &c.			
For drawing brief or case for hearing, per folio of 72 words .....	.....	0 1 0	0 1 0
For each copy, per folio of 72 words .....	.....	0 0 4	0 0 4
For any special letter during the dependence of the cause	0 3 6		
For every term commencing on the day the sittings commence and terminating on the day preceding the next sittings in which any business is done .....	.....	0 15 0	0 15 0
And further in country agency causes or matters, for letters .....	.....	0 6 0	0 6 0
Where no proceeding in the cause is taken which carries a term fee, a charge for letters may be allowed if the circumstances require it.			
In addition to the above an allowance is to be made for the necessary expense of postage, carriage, and transmission of documents.			
For maps or plans, each from	{ 1 1 0 to 3 3 0 0 10 0 to 1 0 0		
Copies of same, if required, each from			

AFFIDAVITS.

Drawing and engrossing affidavit of service or search:—			
If 3 folios of 72 words or under.....	0 5 0		
If above, for every additional folio, including a copy for the Court.....	0 1 4		
For drawing and engrossing any other affidavit, including copy for the Court or registry, per folio .....	.....	0 1 4	0 1 4
For preparing each exhibit in town or country .....	.....	0 1 0	0 1 0

INTERROGATORIES.

For drawing the same, at per folio of 72 words	0 1 0	0 1 0	0 1 0
Copy thereof to be delivered to the examiner and filed, at per folio of 72 words.....	0 0 4	0 0 4	0 0 4

If it becomes necessary for solicitors to transact any business for which no fee is herein specified, such fee shall be taken by them as would be allowed for similar business done in the other Divisions of the High Court of Justice.

Fees to be taken for the use of other Persons by Solicitors of the Supreme Court of Judicature in respect to Divorce and Matrimonial Causes on and after the 1st day of January, 1886.

COUNSELS' CLERKS' FEES.

Not to exceed as under:—	£	s.	d.
Upon a fee to counsel under 5 guineas	0	2	6
5 guineas and under 10 guineas	0	5	0
10 guineas and under 20 guineas	0	10	0
20 guineas and under 30 guineas	0	15	0
30 guineas and under 50 guineas	1	0	0
50 guineas and upwards—at per cent. on the fee paid	2	10	0
On consultations:—			
Senior's clerk	0	7	6
Junior's clerk	0	2	6
On general retainer (where allowed)	0	10	6
On common retainer	0	2	6
On conference	0	5	0

ALLOWANCE TO WITNESSES, INCLUDING THEIR BOARD AND LODGING.

Common witnesses, such as labourers, journeymen, &c., &c.:—

If resident within 5 miles of the General Post Office, per diem	0	5	0
If resident beyond that distance, per diem, from	{	0	5
		to	0
		0	7
		6	

Master tradesmen, yeomen, farmers, &c.:—

If resident within 5 miles of the General Post Office, per diem, from	{	0	7
		to	6
		0	10
		0	0
If resident beyond that distance, per diem, from	{	0	10
		to	0
		0	15
		0	

Auctioneers and accountants:—

If resident within 5 miles of the General Post Office, per diem, from	{	0	10
		to	6
		1	1
		0	
If resident beyond that distance, per diem, from	{	0	10
		to	6
		1	1
		0	

Professional men:—

If resident within 5 miles of the General Post Office, per diem	1	1	0
If resident beyond that distance, per diem, from	{	2	2
		to	0
		3	3
		0	

Clerks to attorneys, or others:—

	£	s.	d.
If resident within 5 miles of the General Post Office, per diem	0	10	6
If resident beyond that distance, per diem, from	0	15	0
		to	0
	1	1	0

Engineers and surveyors:—

If resident within 5 miles of the General Post Office, per diem	1	1	0
If resident beyond that distance, per diem, from	1	1	0
		to	0
	3	3	0

Notaries, per diem 1 1 0

Esquires, bankers, merchants, and gentlemen, per diem 1 1 0

Females, according to station in life:—

If resident within 5 miles of the General Post Office, per diem,	0	5	0
from.....	0	10	0
		to	0
If resident beyond that distance, per diem, from	0	5	0
		to	0
	1	0	0

Police inspector:—

If resident within 5 miles of the General Post Office, per diem	0	5	0
If resident beyond that distance, per diem, from	0	7	6
		to	0
	0	10	0

Police constable:—

If resident within 5 miles of the General Post Office, per diem	0	3	0
If resident beyond that distance, per diem, from	0	5	0
		to	0
	0	7	6

The travelling expenses of witnesses will be allowed according to the sums reasonably and actually paid; but in no case will there be an allowance for such expenses of more than 1s. per mile one way.

Commissioners for taking oaths:—

For administering oaths to each deponent	0	1	6
For marking each exhibit annexed to an affidavit	0	1	0

Cause No. .

In the High Court of Justice.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

(DIVORCE.)

1. PETITIONER'S (WIFE) COSTS UP TO TRIAL FOR
JUDICIAL SEPARATION . . . . .	61—82

	£	s.	d.	£	s.	d.
189 . May 1. Instructions for petition for judicial separation				0	6	8
Drawing and engrossing petition, including copy to file (folios 12)				1	2	8
Fee to Mr. ——— to settle petition	1	3	6			
Attending him				0	6	8
Instructions for affidavit in support of petition.....				0	6	8
Drawing and engrossing same.....				0	6	8
8. Attending petitioner on her signing petition.....				0	6	8
Paid oath	0	1	6			
Instructions for citation				0	6	8
Drawing same, parchment and præcipe				0	7	6
Attending filing petition and affidavit				0	6	8
Paid filing	0	5	0			
Attending getting citation sealed				0	6	8
Paid sealing	0	5	0			
Paid for office copy petition under seal, collating and certifying	0	14	0			
Attending for same				0	6	8
Copy citation for service				0	1	8
9. Writing Mr. ——— of ———, France, with office copy petition and copy citation and with full instructions for service				0	5	0
Paid postage and registering letter to him	0	1	3			
15. Instructions for petition for alimony <i>pendente lite</i>				0	6	8
Drawing same				1	0	0
Fair copy				0	2	0
Attending filing petition for alimony				0	6	8
Paid filing	0	2	6			
Paid agent's charges for service of petition and citation	3	0	2			
Copy petition for alimony for service				0	2	0
Service of petition for alimony on respondent at Forest Hill, and mileage				0	10	0
25. Writing Messrs. ——— in reply to theirs that we could not consent to their having any further time to file answer unless respondent paid £10 on account of alimony, and then we would consent to their having 14 days				0	3	6
Attending respondent's summons for further time to file answer to petition for alimony when order made for 14 days				0	6	8
Perusing respondent's answer to petition for alimony...				0	6	8

	£ s. d.	£ s. d.
June 14. Attending registrar obtaining appointment to fix alimony		0 6 8
Paid registrar's fee for fixing alimony	0 10 0	
Copy and service of appointment on respondent		0 4 0
Attending respondent's solicitors on their obtaining 14 days further time to file answer to petition.....		0 6 8
Sittings' fee (agency)		1 1 0

Trinity Sittings.

18. Attending filing citation against respondent		0 6 8
Paid filing	0 2 6	
20. Attending appointment before registrar to fix alimony when appointment adjourned till next Monday as no one attended for respondent		0 6 8
24. Attending appointment to fix alimony <i>pendente lite</i> when order made fixing the alimony at £—— a year		0 13 4
29. Attending to draw up order for alimony <i>pendente lite</i>		0 6 8
Paid for order	0 5 0	
July 4. Copy and service of order on respondent.....		0 3 6
Perusing answer to petition		0 6 8
9. Summons to strike out answer on ground that same was embarrassing, and also respondent's appearance on the ground that he had not given an address for service within the radius		0 5 0
Attending to issue		0 6 8
Paid issuing	0 8 0	
Copy and service of summons		0 3 6
15. Attending summons when order made striking out answer, and respondent ordered to give an address for service within the radius at once		0 6 8
Attending in registry drawing up order		0 6 8
Copy and service of order		0 3 6
Perusing amended answer of the respondent		0 6 8
Attending searching at Divorce Registry if the respondent had filed his amended answer and found he had..		0 6 8
29. Drawing summons to strike out answer and copy to file		0 5 0
Attending issuing		0 6 8
Paid issuing	0 8 0	
Copy and service of summons		0 3 6
August 5. Attending summons to strike out respondent's answer to petition on the ground that same was embarrassing, when as the respondent did not attend, the registrar on our application adjourned the summons until Wednesday next, to give the respondent another opportunity to attend		0 6 8
Notice to respondent that summons had been adjourned till Wednesday next		0 4 0
Attending adjourned summons when, as the respondent although in the registry refused to attend the summons, the registrar made an order striking out all but the first 5 lines of the answer, on our filing affidavit of service and no attendance		0 6 8
Drawing and engrossing affidavit of service and no attendance		0 6 8

	£	s.	d.	£	s.	d.
Attending to be sworn				0	6	8
Paid oath and exhibit	0	2	6			
Marking exhibit				0	1	0
Attending filing affidavit of service				0	6	8
Paid filing affidavit	0	2	6			
Attending drawing up order				0	6	8
Copy and service of order				0	3	6
13. Attending in registry amending respondent's answer pursuant to order				0	6	8
Paid fee on amending	0	2	6			
15. Attending at India Office bespeaking copy of certi- ficate of marriage				0	6	8
Paid for search and for certificate	0	11	0			
Attending bespeaking registrar's certificate that plead- ings in order				0	6	8
22. Attending for certificate and setting down cause... ..				0	6	8
Paid setting down	3	2	6			
Notice thereof, copy and service				0	4	0
Copy notice to file				0	1	0
Paid filing	0	2	6			
Drawing bill of costs and copies (folios 28)				1	8	0
Attending filing				0	6	8
Paid filing	0	2	6			
Notice of taxing copy and service				0	4	0
Attending taxing				0	13	4
Attending agreeing costs				0	6	8
Attending fixing amount of security for further costs... ..				0	6	8
Attending for order				0	6	8
Paid for same	0	15	0			
Copy and service of order				0	4	0
Sittings' fee (agency)				1	1	0

2. PETITIONER'S (WIFE) COSTS OF TRIAL—JUDICIAL SEPARATION—EXAMINATION OF WITNESS BEFORE SPECIAL EXAMINER.

Trinity Sittings, 19 .

	£	s.	d.	£	s.	d.
Attending searching if respondent had paid £—— into Court as further security for costs as ordered and found he had				0	6	8
Attending retaining Mr. —— on behalf of the peti- tioner				0	6	8
Fee to him and clerk	1	3	6			
Instructions to him to advise on evidence				0	13	4
Paid his fee and clerk	2	4	6			
Attending him				0	6	8
Nov. 18. Drawing præcipe and attending getting 2 subpœnas ad test. sealed				0	13	4
Paid	0	10	0			
Paid parchment	0	1	0			

Copy and service of subpoena on ——— and mileage (6 miles)	£ s. d.	£ s. d.
The like on ——— .....	.....	0 12 0
The like (4 more witnesses) .....	.....	0 6 0
Instructions for brief, including several journeys to ———, taking proofs of evidence of petitioner and witnesses .....	.....	1 4 0
Drawing same (together 100 folios) .....	.....	8 8 0
Brief copy for counsel .....	.....	5 0 0
The like petition for judicial separation and respondent's answer and amended answer thereto (together folios 45) .....	.....	1 13 4
The like certificate of Dr. ——— and Dr. ——— and affidavit verifying their certificate (together folios 10) .....	.....	0 15 0
Fee to Mr. ——— with brief .....	.....	0 3 4
Attending him	5 10 0	0 6 8
Attending appointing conference with counsel .....	.....	0 3 4
Attending conference, when he considered the evidence of ——— very material and that we must take it before a special examiner if she could not attend Court .....	.....	0 13 4
Conference fee to him and clerk	1 6 0	.....
Attending at ——— on Dr. ———, the medical man of the witness, when he informed us that it was out of all question to suppose the witness would be able to attend the trial, and he gave us a certificate to that effect to enable us to get an order to take the witness's evidence before a special examiner .....	.....	1 1 0
25. Drawing and engrossing summons for examination of ——— before special examiner and for further security for costs .....	.....	0 5 0
Attending issuing .....	.....	0 6 8
Paid stamps thereon	0 8 0	.....
Copy and service of summons on respondent at ——— .....	.....	0 5 0
Instructions for affidavit in support of summons .....	.....	0 6 8
Drawing same .....	.....	0 5 0
Engrossing .....	.....	0 1 8
Attending swearing affidavit .....	.....	0 6 8
Paid oath and exhibit	0 2 6	.....
Marking exhibit .....	.....	0 1 0
Copy affidavit and exhibit for respondent (together folios 8) .....	.....	0 2 8
29. Attending summons for examination of ——— before special examiner, when order made for examination and Mr. ——— appointed examiner, and respondent ordered to give £—— further security for costs of examination .....	.....	0 6 8
Paid filing affidavit	0 2 6	.....
30. Attending drawing up order for examination .....	.....	0 6 8
Copy and service of order at ———, and mileage .....	.....	0 6 8
Attending drawing up order for further security .....	.....	0 3 6
*Copy and service of order at ——— .....	.....	.....
Dec. 1. Perusing affidavit and doctor's certificate received from respondent that witness was not in a fit state to be examined .....	.....	0 6 8
Attending witness's doctor therewith when he wrote us his opinion that witness was quite capable of giving evidence .....	.....	0 13 4

* Served with copy order for examination.

	£	s.	d.	£	s.	d.
4. Attending examiner obtaining an appointment from him to take the examination				0	6	8
Drawing and engrossing notice thereof				0	5	0
Copy and service of appointment on respondent at ———, and mileage				0	5	0
Instructions to Mr. ——— to attend and examine witness on behalf of the petitioner				0	13	4
Fair copy proof of witness for him (folios 10).....				0	3	4
Fee to him and clerk	2	4	6			
Attending him				0	6	8
Attending appointing conference with him				0	6	8
Conference fee to him and clerk	1	6	0			
Attending conference				0	13	4
8. Attending searching cause list when we found this case would be in to-morrow's paper				0	6	8
Attending respondent's summons to rescind or vary the order for examination of witness, when same dismissed				0	6	8
Instructions to Mr. ——— to apply that case be not taken before				0	6	8
Fee to him and clerk	1	3	6			
Attending him				0	3	4
Instructions for affidavit in support of application to postpone trial				0	6	8
Drawing same				0	8	0
Engrossing				0	2	8
Attending to be sworn				0	6	8
Paid oath	0	1	6			
Brief copy affidavit for counsel (folios 8)				0	2	8
Fair copy for respondent				0	2	8
Notice of application to him, copy and service.....				0	4	0
Attending Court when application made, and judge ordered that case be not in the paper before.....				0	13	4
Paid filing affidavit	0	2	6			
9. Attending examination at ———, when examination taken				2	2	0
10. Attending at Divorce Registry searching if examination had been filed by examiner, and found it had, paying fees thereon, and bespeaking copy thereof				0	6	8
Paid filing fees	0	5	6			
Fee to Mr. ———, as examiner	3	13	6			
Attending paying				0	6	8
10. Attending at Divorce Registry obtaining office copy examination of witness				0	6	8
Paid for same	0	9	0			
Brief copy for counsel				0	4	8
Attending searching if this case would be in the paper for trial to-morrow and found it would				0	6	8
Notice to respondent and 7 witnesses to attend trial....				0	14	0
11. Attending Court all day, case partly tried and adjourned till to-morrow				2	2	0
Clerk's attendance on the witnesses				0	10	6
Attending marking refresher on Mr. ———'s brief.....				0	6	8
Refresher fee to him and clerk	3	5	6			
12. Attending Court, case proceeded with and judgment given for the petitioner for judicial separation with custody of children with costs				2	2	0
Clerk's attendance				0	10	6

	£	s.	d.	£	s.	d.
Attending settling with witnesses				0	6	8
Attending bespeaking office copy decree under hand of judge				0	6	8
Paid for same	0	5	0			
Copy thereof				0	2	0
Service on respondent				0	2	6
Drawing bill of costs and copies (folios).....						
Attending filing				0	6	8
Paid filing	0	2	6			
Notice of taxing copy and service at ———				0	5	0
Attending taxing				0	13	4
Attending agreeing costs				0	6	8
Attending registry with authority for payment of sum out of Court and getting same signed				0	6	8
Attending at paymaster's office and lodging same.....				0	6	8
Attending for cheque				0	6	8
Attending for order for payment of balance of taxed costs				0	6	8
Paid for same	0	5	0			
Copy and service of order.....				0	6	0
Term fee				1	1	0
Letters, messengers, &c.				1	1	0
Paid witnesses						

3. COSTS OF PETITIONER (WIFE) OF PETITION FOR A DIVORCE ON THE GROUND OF CRUELTY AND ADULTERY, DOWN TO DECREE NISI.

Michaelmas Sittings, 19 .

	£	s.	d.
Nov. 10. Instructions for petition	0	6	8
Attending retaining Mr. B.	0	6	8
Paid his fee and clerk	1	3	6
Drawing petition, and copy to file	1	0	0
Fee to Mr. B. and clerk to settle	1	3	6
Attending him	0	3	4
Instructions for affidavit in support	0	6	8
Drawing and copy affidavit in support	0	6	8
27. Attending petitioner reading over petition and affidavit, and attending commissioner appointing for him to administer oath, and subsequently when he administered oath	0	6	8
Paid oath and exhibit	0	2	6
Attending filing petition	0	6	8
Paid	0	5	0
Paid filing affidavit	0	2	6
Dec. 4. Instructions for citation against the respondent	0	6	8
Drawing and engrossing same, and præcipe	0	7	6
Paid stamp thereon	0	5	0
Paid parchment	0	1	6
Attending at the registry procuring same to be signed and sealed..	0	6	8
Attending at the registry for and obtaining office copy petition certified and sealed	0	6	8

	£	s.	d.
Paid for copy	0	5	0
Paid sealing	0	5	0
Paid certifying	0	2	6
Copy citation, for service on respondent at B.	0	1	8
Writing correspondent at B. (Mr. G.) with citation and petition for service, and with full instructions	0	3	6
7. Letter to Mr. G. acknowledging receipt of citation, with certi- ficate of service indorsed, and inclosing his charges.....	0	3	6
Paid agent's charges for service			
Certificate of service	0	2	6
10. Instructions for petition for alimony <i>pendente lite</i>	0	6	8
Drawing same, and copy for counsel (folios 12)	1	2	8
11. Fee to Mr. B. and clerk to settle draft petition	1	3	6
Attending him	0	3	4
Attending filing petition	0	6	8
Paid	0	5	0
Copy petition for service	0	4	0
Service thereof on respondent's solicitors	0	2	6
Attending filing citation	0	6	8
Paid	0	2	6
18. Attending giving consent to order for extension of time to answer petition for alimony	0	6	8
Attending giving consent for further time to answer petition for dissolution	0	6	8
Term fee	0	15	0

Hilary Sittings, 19 .

Jan. 17. Attending summons for further time to answer petition; order made for 7 days; answer to petition for alimony to be filed at the same time, and £20 to be paid on account of alimony to petitioner's solicitor on or before 24th inst.	0	6	8
19. Perusing copy respondent's answer to petition for dissolution received from his solicitors by post this morning	0	3	4
26. Notice of motion for directions as to mode of trial, copy and service on respondent's solicitors	0	4	6
27. Drawing case for motion, and copy for the judge	0	8	0
Copy notice of motion, to accompany	0	1	0
Attending in the registry filing same	0	6	8
Paid stamps	0	11	0
Copy case on motion, for counsel	0	3	4
Copy notice of motion, to annex	0	1	0
Feb. 1. Attending Mr. B. with brief	0	6	8
Paid his fee and clerk	1	3	6
Attending summons for further time to answer petition for alimony; order made, to be filed to-day	0	6	8
On receipt of affidavit in answer to petition for alimony, perusing same and schedule thereto (folios 14)	0	4	8
Attending Court on motion; directions given for cause to be heard before the Court itself	0	13	4
2. Attending drawing up order	0	6	8
Paid	0	2	6
Attending setting cause down	0	6	8
Paid fees	3	5	0
Notice of setting down to respondent's solicitors, copy and service.	0	4	0
Copy notice, to file	0	1	0

	£	s.	d.
4. Drawing retainer and attending Mr. J., K.C., and retaining him	0	6	8
Paid his fee and clerk	1	3	6
8. Instructions for affidavit in reply	0	6	8
Drawing same and copy for counsel	0	9	4
Fee to Mr. B. to settle same and clerk	1	3	6
Attending him	0	3	4
Preparing summons for leave to file reply to answer to petition for alimony, notwithstanding time expired	0	5	0
Attending to issue same	0	6	8
Paid fee thereon	0	3	0
Copy and service on respondent's solicitors	0	3	6
9. Attending obtaining appointment to proceed on reference as to alimony in anticipation of reply to save time	0	6	8
Notice thereof to respondent's solicitors	0	4	0
14. Attending summons for leave to file reply to answer to petition for alimony, order made	0	6	8
Attending petitioner on her being sworn to reply to petition.....	0	6	8
Paid oath	0	1	6
15. Attending drawing up order for leave to file reply.....	0	6	8
Paid for order	0	5	0
Attending filing reply	0	6	8
Paid	0	5	0
Notice of filing to respondent's solicitors	0	4	0
Copy reply for them	0	2	4
22. Attending proceeding before the registrar on the reference as to alimony <i>pendente lite</i> ; same fixed at £188 per annum, payable monthly; the registrar declined to make any allowance for maintenance of children	0	13	4
Paid fee on reference	1	0	0
24. Attending drawing up order for alimony <i>pendente lite</i>	0	6	8
Paid for order	0	5	0
Copy and service of order upon Messrs. L. and L.	0	4	0
Term fee	0	15	0

Easter Sittings, 19 .

April 26. Instructions for advice on evidence, charges of cruelty extending from 18	1	1	0
27. Fee to Mr. B. with case and papers, and to his clerk	5	10	0
Attending him	0	6	8
May 15. Four subpoenas ad test.	1	6	8
Paid sealing	1	0	0
Term fee	0	15	0

Trinity Sittings, 19 .

June 15. Writing the Rev. D. B. (Londonderry), in reply, that the trial was expected to take place within the next fortnight, and requesting him to inform Miss M. and Mrs. M. to hold themselves in readiness to come to London	0	3	6
Letter to Mr. C. urging him to send reply to my letter of 10th instant, and informing him the trial was expected shortly to take place	0	1	6
23. Letter to Mrs. H. (petitioner) desiring her to hold herself in readiness to come up to town with Misses C. and L. M.....	0	3	6

	£	s.	d.
Drawing notice to produce (folios 10) and copy to serve.....	0	10	0
Service	0	2	6
Instructions for brief, including case for advice on evidence and numerous attendances, special instructions from time to time, and letters and telegrams to and from Mr. K.; perusing his several reports; conferences with and attendances on the petitioner relating thereto, and perusing and considering voluminous correspondence between her and the respondent; conferences with counsel not otherwise charged; also with photographers, and several and repeated attendances on witnesses and other persons subpœnaed and attending from Ireland and other places.	10	10	0
Drawing brief, less letters, &c. copied therewith (viz., 552 folios less 19=533)	26	13	0
Two copies for counsel	17	15	8
The like of letters included in brief (folios 19 each)	0	12	8
Two copies notice to produce	0	6	8
The like of notice of trial	0	2	0
24. Attending to watch cause list	0	6	8
26. Attending Mr. J., K.C., with brief.....	0	13	4
Paid his fee and clerk	27	0	0
Attending him to obtain appointment for consultation	0	6	8
Paid him consultation fee and clerk	2	9	6
Attending Mr. B. with brief	0	13	4
Fee to him and clerk	21	15	0
Attendance to appoint consultation	0	3	4
Paid him consultation fee and clerk	1	3	6
27. Sixteen notices to witnesses to attend on their subpœnas.....	1	6	0
Service of subpœna on Miss M.	0	5	0
28. Attending to ascertain if cause in the paper for to-morrow; it was struck out at the last moment	0	6	8
Attending dispatching telegram to Mr. K. not to bring up witnesses until to-morrow night	0	3	4
Paid	0	1	0
Attending dispatching telegram to Mrs. H. not to attend with her daughters to-morrow	0	3	4
Paid	0	1	0
29. Attending consultation, arranged not to call Dr. C. or Mr. B., but as L. and T. could not be found, Dr. H., of Bath, must be called	0	13	4
Attending searching list, cause inserted for to-morrow	0	6	8
Attending dispatching telegram to Mr. K. to bring up all the witnesses, including Dr. H., but not Mr. B., to-day.....	0	3	4
Paid	0	1	0
Attending dispatching telegram to Mrs. H. to attend the Court to-morrow with Misses C. and L. H. and A. W.	0	3	4
Paid	0	1	0
Attendances searching for, bespeaking, and to procure certificate of marriage	0	6	8
Paid fees	0	3	7
Notices to Mrs. M. and Miss M. to attend on their subpœnas.....	0	3	0
30. Attending Court on hearing of cause; decree nisi, with costs, and order for custody of children	2	2	0
(If all day, 3 <i>l.</i> 3 <i>s.</i>)			
Payments to witnesses (as per scale, p. 617).			
Attending bespeaking copy decree nisi	0	6	8
The like copy order for custody signed by the judge	0	6	8
Paid fee thereon	0	5	0

July 18. Instructions for affidavit in support of motion for maintenance of children	£	s.	d.
Drawing same and copy for counsel (folios 16)	0	6	8
Fee to Mr. B. to settle same and clerk	1	1	4
Attending him	0	3	4
19. Attending Mrs. H. on her deposing thereto	0	6	8
Paid oath	0	1	6
Drawing notice of motion, copy and service on respondent's solicitors	0	4	6
Copy notice, to file	0	1	0
Paid filing	0	2	6
Copy affidavit for them	0	5	4
20. Drawing case for motion, and copy to file	0	10	0
Attending filing same, and affidavit in support, and notice.....	0	6	8
Paid setting down motion	0	10	0
Paid filing affidavit and notice	0	5	0
22. Copy case for counsel	0	3	4
Drawing observations and copy (1 brief sheet)	0	10	0
Copy notice of motion to annex to brief	0	1	0
Attending Mr. B. with brief	0	6	8
Fee to him therewith, and clerk	2	4	6
26. Perusing copy affidavit of respondent in opposition to motion (folios 10)	0	3	4
Copy for counsel	0	3	4
Attending Court on motion; order made for allowance at the rate of 50 <i>l.</i> per annum for each child, payable monthly.....	0	13	4
Attending in the registry drawing up the order.....	0	6	8
Paid for office copy	0	2	6
Drawing affidavit of increase (folios 24)	1	4	0
Engrossing	0	8	0
Attending being sworn	0	6	8
Paid oath	0	1	6
Fair copy for respondent's solicitors	0	8	0
Drawing bill of costs and copy, and copy to file (folios 75).....	3	15	0
Service thereof and of copy affidavit	0	2	6
Attending filing bill and affidavit	0	6	8
Paid fees	0	5	0
On receipt of appointment to tax, copy and service.....	0	4	0
Attending taxing	2	2	0
Attending making bills agree and taking copy certificate.....	0	13	4
Taxing fee			
Term fee	0	15	0
Letters, postages, telegrams, messages, and attendances not before charged	3	3	0

SUPPLEMENTAL BILL.*

18 . Feb. 26. Attending appointment before registrar to settle minutes of order; adjourned for a week at the request of the respondent's solicitors	0	6	8
March 2. Attending respondent's solicitors on their bringing copy opinion of Mr. F. taken by them, and conferring as to course to be taken; they intimated they should require the matter to go before the judge, but it was agreed to attend the appointment before the registrar on Monday next	0	6	8
Perusing copy opinion	0	4	0

* See *Ottaway v. Hamilton* (1878), 3 C. P. D. 393.

5. Attending adjourned appointment before the registrar; respondent's solicitors read the opinion of Mr. F., and at their request an adjournment to the judge in chambers was directed, to be attended by counsel:—	£	s.	d.
Drawing brief to counsel to attend, and copy (1 brief sheet) ..	0	10	0
Copy opinion of Mr. F., to accompany	0	4	0
Fee to Mr. B. with brief and clerk	2	4	6
Attending him	0	6	8
Attending adjournment before the judge in chambers; his lordship, after hearing the arguments, intimated that his decision would be given next week	0	6	8
12. The case having been set down with the motions for tomorrow, fee to Mr. B. to attend, and clerk	1	3	6
Attending him	0	3	4
13. Attending Court; the judge gave his decision in favour of the petitioner on all points, declaring it to be his intention that not only every interest which the respondent took in his wife's moneys under the settlement, but every power over it, was to be forfeited, as if he were actually dead	0	13	4
Drawing this bill and 2 copies (folios 7)*.....	0	7	0

4. FURTHER COSTS OF PETITIONER DOWN TO DECREE ABSOLUTE.

Trinity Sittings, 19 .

July 26. Instructions for and drawing petition for permanent maintenance of the petitioner and her children (folios 16), and copy for counsel	1	8	0
28. Fee to Mr. B. to settle same, and clerk	1	3	6
Attending filing	0	6	8
Paid	0	5	0
Attending bespeaking certified and sealed copy for service on respondent, and subsequent attendance for same	0	6	8
Paid fees	0	17	0
Letter to correspondent at B. therewith, for service on respondent.	0	3	6
Instructions for petition to vary settlement	0	6	8
Drawing same and copy for counsel	0	6	8
Perusing copy settlement of 13th June, 18 (folios 161).....	2	13	8
Copy for counsel	2	13	8
Paid trustees' solicitor for copy deed of appointment executed by petitioner and respondent under settlement	0	14	6
Copy deed for counsel	0	11	8
Fee to Mr. B. and clerk to peruse papers and settle draft petition.	2	4	6
Attending him	0	6	8

* In this case the registrar, taxing in the usual course as between party and party, struck out (without taxing them) the whole of the charges for detectives employed in obtaining information relating to the acts of adultery, &c. alleged to have been committed by the respondent in divers places. These and other costs disallowed upon the taxation in the suit as between husband and wife were held by the Common Pleas Division, and afterwards by the Court of Appeal, to be recoverable by her solicitor against the husband, so far as they were properly and reasonably incurred, as necessities supplied to the wife: see *Ottaway v. Hamilton*, 3 C. P. D. 393.

	£	s.	d.
Paid for certified and sealed copy petition for service on respondent	0	17	0
The like for service on Colonel W., one of the trustees.....	0	17	0
Letter to Mr. W., Wrexham, with same for service.....	0	3	6
Paid for certified and sealed copy petition for service on the other trustee.....	0	17	0
August 2. Letter to Messrs. M. and B., Sherborne, with same for service on Mr. K., at L. Rectory	0	3	6
4. Letter to Mr. G., Bath, with post office order for charges for service of petition on respondent, and attending for order.....	0	3	6
Paid	0	10	8
Paid Messrs. M. and B., Sherborne, with post office order for charges for service of petition on Mr. H.	1	0	6
9. Paid Messrs. A. and B. with post office order for their charge for service of petition on Colonel W.	0	13	8
16. Attending summons for time to answer petition for permanent maintenance and petition to vary settlement; order made for a month.....	0	6	8
Sept. 13. Attending summons for further time to answer petitions; order made for 3 weeks	0	6	8
Oct. 25. Perusing copy answer to petition for permanent maintenance served by respondent's solicitors (folios 17).....	0	5	8
Perusing copy answer to petition for alteration of settlement (folios 16)	0	5	4
30. Instructions for reply to answer to petition for permanent maintenance	0	6	8
Drawing same and copy for counsel (folios 8)	1	0	0
Attending Mr. B. therewith to settle	0	3	4
Paid his fee and clerk	1	3	6
Engrossing reply	0	2	8
Attending petitioner on her deposing thereto	0	6	8
Paid oath	0	1	6
Attending filing	0	6	8
Paid	0	5	0
Copy for service on respondent's solicitors	0	2	8
Service thereof	0	2	6
30. Instructions for reply to respondent's answer to petition for alteration of settlement	0	6	8
Drawing same and copy for counsel (folios 7)	1	0	0
Attending Mr. B. therewith to settle	0	3	4
Paid his fee and clerk	1	3	6
Nov. 3. Engrossing same	0	2	4
Attending petitioner and with her to commissioner on her deposing thereto	0	6	8
Paid oath	0	1	6
Attending filing	0	6	8
Paid fee	0	2	6
Notice of filing to respondent's solicitors	0	4	0
Copy reply for them	0	2	4

Michaelmas Sittings, 19 .

Nov. 27. Attending for and obtaining appointment to proceed on petitions	0	6	8
Notice thereof to respondent's solicitors	0	4	0
Having received notice that respondent would attend by counsel, brief copy to counsel to attend and support petition for permanent maintenance	0	5	4
The like answer	0	5	8

	£	s.	d.
The like reply	0	2	8
Drawing observations and copy (2 brief sheets).....	0	10	0
Copy petition for alimony <i>pendente lite</i> to accompany (folios 12).	0	4	0
The like of answer (folios 14)	0	4	8
The like of reply*	0	3	4
Fee to counsel with brief and clerk	2	4	6
Attending him	0	6	8
Brief petition to alter settlements for counsel	0	5	4
The like of answer	0	3	4
The like of reply	0	2	4
Dec. 5. Attending Mr. B. with brief	0	6	8
Paid his fee and clerk	1	3	6
6. Attending proceeding on petition for permanent maintenance, adjoined to 18th instant, respondent to furnish evidence of sale of house, value of furniture, paintings, prints, china, &c.....			
Attending proceeding on petition to vary settlement, adjourned to same time	0	13	4
16. Attending Mr. B. with brief and papers to attend adjourned appointment before registrar on petition for permanent main- tenance.....	0	6	8
Paid his fee and clerk	2	4	6
18. Attending adjourned appointment on reference, petition for permanent maintenance, adjourned to 4th January next on the application of the respondent, and at his expense.....			
Attending adjourned appointment on petition to vary settlement, adjourned in like manner	0	6	8
18. Jan. 1. Perusing copy affidavit of respondent and valuer as to value of furniture, plate, pictures, &c., received from respon- dent's solicitors (folios 8)	0	2	8
2. On receiving letter from Messrs. M. and D. offering to produce contract for sale of house in Bath, for my inspection, attending them inspecting contract accordingly and taking particulars....	0	6	8
3. Attending adjourned appointment proceeding on petition for maintenance	0	6	8
The like petition to vary settlement	0	6	8
6. Attending at registry on receipt of letter from registrar's clerk perusing and settling draft report on petitions for maintenance and to vary settlement	0	6	8
10. Attending bespeaking office copy report	0	6	8
Paid	0	5	0
Paid fees on reference	2	0	0
The like	0	10	0
Notice of filing report, copy and service	0	4	0
Term fee	0	15	0

Hilary Sittings, 19

17. Notice of motion for decree absolute and to confirm report on petition for maintenance and for order thereon, copy and service	0	4	0
18. Attending searching for appearance in opposition to decree absolute	0	6	8
Paid fee	0	1	0
Attending searching minutes for any affidavit in opposition.....	0	6	8
Drawing and engrossing affidavit of result (folios 5).....	0	6	8
Attending to depose thereto	0	6	8
Paid oath	0	1	6

* All the above documents were referred to in the respondent's answer.

	£	s.	d.
Drawing case for motion and copy to file	0	10	0
Copy notice to file	0	1	0
Attending filing case, affidavit, and notice.....	0	6	8
Paid fee on motion and for order.....	0	10	0
Paid fee on entering order for maintenance.....	0	5	0
Paid filing affidavit and notice.....	0	3	0
19. Copy case on motion for counsel.....	0	3	4
The like of report (folios 10).....	0	3	4
Copy notice of motion to annex to brief.....	0	1	0
The like of affidavit of searches.....	0	1	8
20. Attending Mr. B. with brief.....	0	6	8
Fee to him and clerk	2	4	6
23. Attending Court on motion; the questions arising on the report were fully argued, and, the Court having expressed its intention of making an order to vary settlement by giving the respondent's life interest to the petitioner and the children living with her, no order for maintenance was made, and the decree nisi was made absolute	0	13	4
Attending at the registry on order.....	0	6	8
Paid for office copy	0	2	6
Copy notice of motion for order on petition for variation of settlement for service on respondent's solicitors.....	0	2	4
Service thereof	0	2	6
Drawing case for motion and copy.....	0	10	0
Copy notice to file therewith.....	0	2	0
Attending filing	0	6	8
Paid	0	6	0
Paid fee on motion	0	3	0
Copy case for counsel	0	3	4
Copy notice of motion to annex to brief.....	0	2	0
Fee to Mr. B. with brief and clerk.....	2	4	6
Attending him	0	6	8
Attending Court on motion; order made, minutes to be settled by counsel	0	13	4
Drawing minutes of order accordingly and copy for counsel (folios 6)	0	8	0
Fee to Mr. B. to settle same, and clerk.....	1	3	6
Attending him	0	3	4
Copy minutes for respondent's solicitors, as required by them.....	0	2	0
Attending at the registry accordingly, but the respondent's solicitors required further time to consider the minutes, and subsequently writing to them to return the minutes approved of with any alterations therein which they might have to suggest.....	0	6	8
29. Several attendances on them for return of draft minutes, and again this day, without success, and attending the registrar with copy minutes, and obtaining appointment before him to settle same on Monday next at half-past 2	0	6	8
Notice of appointment to respondent's solicitors, copy and service.....	0	4	0
Copy minutes for the registrar	0	2	0
Attending at the registry drawing up order.....	0	6	8
Attending bespeaking and to procure certified and sealed copy of the decree for service on the trustees.....	0	6	8
Paid for same	0	5	0
Letter to Mr. G., the trustees' solicitor, for acceptance of service on behalf of the trustees	0	5	0
Drawing bill of costs and copy (folios 39).....	1	6	0
Copy for respondent's solicitors	0	13	0
Service thereof	0	2	6

	£	s.	d.
Attending filing bill	0	6	8
Paid	0	2	6
Notice of appointment to tax to respondent's solicitors, copy and service	0	4	0
Attending taxing	1	1	0
Attending at the registry to complete bill as taxed and for allocatur	0	6	8
Term fee	0	15	0
Letters, &c.	0	10	0
Paid taxing			

5. PETITIONER'S COSTS AGAINST CO-RESPONDENT—ORDER
FOR LEAVE TO TAKE CHILDREN OUT OF THE JURISDICTION. RESPONDENT GIVEN HER COSTS.

Michaelmas Sittings, 19

	£	s.	d.	£	s.	d.
Dec. 18. Instructions for petition for divorce.....	.....			0	6	8
Drawing and engrossing same .....	.....			1	0	0
If exceeding 10 folios, for every additional folio, including a copy to file .....	.....			0	1	4
Fee to Mr. ——— to settle	1	3	6			
Attending him .....	.....			0	3	4
Instructions for affidavit verifying petition .....	.....			0	6	8
Drawing same .....	.....			0	5	0
20. Attending filing petition and affidavit.....	.....			0	6	8
Paid	0	5	0			
Drawing and copy retainer to Mr. ——— .....	.....			0	6	8
Fee to him and clerk	1	3	6			
Attending for copy petition under seal .....	.....			0	6	8
Paid	1	2	0			
Instructions for citation against respondent.....	.....			0	6	8
Drawing same, parchment, and præcipe.....	.....			0	7	6
Attending getting same sealed .....	.....			0	6	8
Paid	0	5	0			
Copy for service .....	.....			0	1	8
Instructions for citation against co-respondent.....	.....			0	6	8
Drawing same, parchment, and præcipe.....	.....			0	7	6
Attending getting same sealed .....	.....			0	6	8
Paid	0	5	0			
28. Attending by appointment at Messrs. ———'s office serving petition and citation on co-respondent.....	.....			0	5	0
Indorsing citation with certificate of service on co-respondent .....	.....			0	2	6
29. Service of petition and citation on respondent... ..	.....			0	5	0
Indorsing citation with certificate of service on respondent.....	.....			0	2	6
Term fee, agency, &c. ....	.....			1	1	0

Hilary Sittings, 19

Jan. 13. Attending searching for appearance of respondent.....	.....			0	6	8
The like co-respondent .....	.....			0	6	8
Perusing respondent's answer .....	.....			0	6	8

	£	s.	d.	£	s.	d.
18. Drawing summons for further particulars of the times and places when and where the acts of wilful neglect, misconduct, &c., alleged in the second paragraph of the answer were committed, and copy for the Court				0	5	0
Attending issuing				0	6	8
Paid issuing and for order to be made thereon.....	0	8	0			
Copy and service of summons				0	3	6
23. Attending summons for particulars when order made				0	6	8
Attending for order				0	6	8
Copy and service of order				0	3	6
Instructions for reply to answer of respondent				0	6	8
Drawing same				0	5	0
Fee to Mr. ——— to settle	1	3	6			
Attending him				0	3	4
Engrossing reply to settle				0	1	0
Attending filing				0	6	8
Paid filing	0	2	6			
Copy for respondent's solicitor				0	1	0
Attending to deliver				0	3	4
Attending filing citation against respondent				0	6	8
Paid filing	0	2	6			
Attending filing citation against co-respondent.....				0	6	8
Paid filing	0	2	6			
Attending searching if answer filed by co-respondent, and found none				0	6	8
Paid search	0	2	6			
Drawing and engrossing affidavit of search and no answer.....				0	6	8
Attending swearing				0	6	8
Paid oath	0	1	6			
Attending filing affidavit of search, and no answer.....				0	6	8
Paid filing	0	2	6			
Attending searching for and bespeaking copy of marriage certificate of parties				0	6	8
Paid search	0	3	7			
Attending bespeaking registrar's certificate of pleadings being in order				0	6	8
Attending for certificate setting down cause for hearing				0	6	8
Paid setting down						
Feb. 5. Drawing notice of setting down copy and service on respondent's solicitors				0	4	0
Copy notice to file				0	1	0
Paid filing	0	2	6			
Copy and service of notice on respondent's solicitors...				0	3	6
15. Drawing summons for leave to file supplemental petition and copy for the Court				0	5	0
Attending issuing				0	6	8
Paid issuing and for order to be made thereon.....	0	8	0			
Copy and service of summons on respondent's solicitors				0	3	6
The like on co-respondent's solicitors.....				0	3	6
16. Attending summons for leave to file supplemental petition, when same adjourned for affidavit in support till to-morrow				0	6	8
Drawing affidavit of Mr. ——— in support of summons for leave to file supplemental petition*				0	5	0

* Instructions disallowed on taxation.

	£	s.	d.	£	s.	d.
Engrossing				0	1	8
Attending to be sworn				0	6	8
Paid oath	0	1	6			
Copy affidavit for respondent's solicitors				0	1	8
Copy affidavit for co-respondent's solicitors				0	1	8
17. Attending adjourned summons for leave to file supplemental petition, when order made.....				0	6	8
Paid filing affidavit	0	2	6			
Attending to draw up order				0	6	8
Copy and service of order on respondent's solicitor....				0	3	6
The like on co-respondent's solicitor				0	3	6
Instructions for supplemental petition				0	6	8
Drawing and engrossing same				1	0	0
Attending Mr. — with same to settle				0	6	8
Paid his fee and clerk	1	3	6			
Instructions for affidavit verifying supplemental petition				0	6	8
Drawing and engrossing same				0	5	0
Attending petitioner on his being sworn thereto.....				0	6	8
Paid oath	0	1	6			
Attending filing supplemental petition and affidavit....				0	6	8
Paid filing petition and affidavit	0	5	0			
Attending for office copy petition				0	6	8
Paid for same under seal	1	0	0			
Attending Mr. — and Messrs. — arranging appointment to serve parties				0	6	8
19. Service of supplemental petition on respondent at —				0	5	0
The like on co-respondent				0	5	0
Attending paying respondent's costs up to trial and afterwards agreeing same				0	13	4
Attending appointment to fix security for respondent's costs of trial, when registrar fixed further security at £20				0	6	8
22. Perusing answer of respondent to supplemental petition				0	6	8
Paid respondent's costs up to setting down						
March 6. Attending registrar with request for lodgment to pay money into Court as security for respondent's costs of trial				0	6	8
Attending Paymaster-General paying £20 into Court...				0	6	8
Paid into Court, afterwards taken out by respondent's solicitors for costs of trial	20	0	0			
Attending searching cause list during sittings.....				0	13	4
Term fee (agency)				1	1	0

Easter Sittings, 19

April. Instructions for brief for petitioner				4	4	0
Drawing same (folios 40)				2	0	0
Fair copy for counsel (folios 40)				0	13	4
The like of pleadings and affidavits to accompany, together (folios 22)				0	7	4
Attending Mr. — with brief				0	6	8
Fee to him and clerk	5	10	0			
The like for conference	1	6	0			
Attending searching cause list during sittings				0	13	4
Term fee (agency)				1	1	0

Trinity Sittings, 19 .

	£	s.	d.	£	s.	d.
Attending marking refresher on Mr. ———'s brief				0	6	8
Fee to him	1	3	6			
Drawing subpoena and præcipe and attending getting same sealed						
Paid parchment	0	1	0			
Copy subpoena for service on ———				0	1	0
Service thereof at Cambridge				0	12	0
Copy subpoena for service on ———				0	1	0
Service thereof at Teignmouth (agency)				0	12	0
July 6. Attending searching Court minutes to ascertain if any answer filed by the co-respondent to the supplemental petition and found none				0	6	8
Paid searching	0	2	6			
Drafting and engrossing affidavit of service of supplemental petition and search for answer				0	6	8
Attending swearing				0	6	8
Paid oath	0	1	6			
Attending filing affidavit of service and search, and no answer				0	6	8
Paid filing	0	2	6			
Attending appointing conference with Mr. ———				0	6	8
Attending conference				0	13	4
Attending searching cause list during sittings, when on this day we found case would be in to-morrow's list.. ..				0	13	4
Notice to 3 witnesses to attend trial				0	6	6
Attending telegraphing Mr. ——— that case in to-morrow's paper and to be at our office at 10 o'clock.. ..				0	3	4
Paid for message	0	0	10			
Attending telegraphing ——— that case in to-morrow's list and to be at our office at 10.30				0	3	4
Paid for message	0	0	9			
Writing ——— in confirmation of telegram				0	3	6
7. Attending petitioner and witnesses on their calling and attending with them to Court, when case heard and decree nisi pronounced with costs against co-respondent, and petitioner to have the custody of the children of the marriage				2	2	0
Attending and settling with witnesses				0	6	8
11. Attending bespeaking office copy decree of Court.. ..				0	6	8
Paid for same	0	3	0			
16. Copy decree for respondent's solicitors				0	3	0
Service thereof				0	2	6
Copy decree for co-respondent's solicitors				0	3	0
Service thereof				0	2	6
24. Attending bespeaking order under judge's hand giving petitioner custody of the children, affidavits for same				0	6	8
Paid for order	0	5	0			
31. Instructions for affidavit of Mr. ——— in support of application to take the children out of the jurisdiction				0	6	8
Drawing same				0	9	0
Engrossing same for swearing				0	3	0
Attending Mr. ——— on his calling later in the day and with him before commissioner to be sworn thereto.. ..				0	6	8
Paid oath	0	1	6			

	£	s.	d.	£	s.	d.
Instructions for affidavit of Mr. ——— in support of application				0	6	8
Drawing same				0	4	0
Engrossing same				0	1	4
Attending Mr. ——— handing same to get sworn.....				0	6	8
Preparing summons for leave to take children out of jurisdiction and copy for the judge				0	5	0
Attending issuing				0	6	8
Paid issuing and for order to be made thereon	0	8	0			
Copy and service of summons on respondent's solicitors				0	3	6
Copy affidavit of Mr. ——— for respondent's solicitors				0	3	0
Copy affidavit of Mr. ———				0	1	4
August 2. Instructions to Mr. ——— to support summons for leave to take children out of the jurisdiction				0	6	8
Copy summons for him				0	1	0
The like brief and affidavit in support, together (folios 13)				0	4	4
Fee to him and clerk	2	4	6			
Attending him				0	6	8
Attending taxing respondent's costs of trial				0	6	8
3. Perusing 2 affidavits of respondent in opposition to summons to take children out of the jurisdiction (folios 14)				0	4	8
Brief copy affidavits for Mr. ———				0	4	8
Instructions for further affidavit of petitioner in opposition to affidavit of respondent				0	6	8
Drawing same (folios 5)				0	5	0
Engrossing				0	1	8
Attending petitioner on his being sworn thereto.....				0	6	8
Paid oath	0	1	6			
Aug. 1. Instructions for affidavit of Dr. ——— in support of summons				0	6	8
6. Drawing same				0	3	0
Engrossing				0	1	0
Attending Dr. ——— on his being sworn thereto.....				0	6	8
Paid oath	0	1	6			
Brief copy of further affidavits of petitioner and Dr. ——— for counsel, together (folios 8)				0	2	8
Attending him therewith				0	3	4
The like copies of affidavits for respondent's solicitors.				0	2	8
Attending summons when, after hearing counsel, judge adjourned same until Thursday next for respondent's solicitors to answer our affidavits if thought advisable				0	6	8
8. Perusing further affidavit of respondent in opposition to summons				0	1	8
Brief copy for counsel				0	1	8
9. Attending petitioner on his calling, and with him before the judge on adjourned hearing of summons, when his lordship made an order that petitioner be at liberty to remove the children out of the jurisdiction of the Court and gave respondent her costs of the application				0	6	8
Paid filing 4 affidavits	0	10	0			
Attending drawing up order for leave to take children out of the jurisdiction				0	6	8
Copy and service of order on respondent's solicitors....				0	3	6
Copy order for custody of children for service on respondent				0	2	0
Indorsing notice thereon and attending serving same on her at ———				0	6	8
Term fee (agency)				1	1	0

Michaelmas Sittings, 19 .

Nov. 7. Attending taxing respondent's costs of petitioner's application for leave to take the children out of the jurisdiction	£ s. d.	£ s. d.
Paid .....	.....	0 13 4
Term fee .....	.....	1 1 0

Hilary Sittings, 19 .

Jan. 15. Costs of making decree nisi absolute and paid as allowed	2 3 10	
Attending bespeaking office copy decree absolute.....	.....	0 6 8
Paid sealing and for office copy	0 10 0	
Attending for same .....	.....	0 6 8
Paid filing affidavit of petitioner	0 2 6	
Drawing this bill of costs and copies (folios 46).....	.....	2 6 0
Attending lodging .....	.....	0 6 8
Paid lodging	0 2 6	
Attending for appointment to tax .....	.....	0 6 8
Notice of taxing, copy and service .....	.....	0 4 0
Attending taxing .....	.....	1 1 0
Attending for order for payment .....	.....	0 6 8
Paid for order	0 5 0	
Copy and service of order .....	.....	0 3 6
Term fee .....	.....	1 1 0
Letters, messengers, &c. ....	.....	1 1 0
Paid witnesses .....	.....

6. PETITIONER'S (WIFE) COSTS OF ORDER FOR PERMANENT ALIMONY AND MAINTENANCE.

Jan. 3. Instructions for petition for permanent alimony and maintenance of children	£ s. d.	£ s. d.
Drawing and engrossing same, including copy to file....	.....	0 6 8
Attending petitioner on her signing petition .....	.....	1 0 0
6. Attending filing petition in Divorce Registry and bespeaking copy under seal for service on the respondent.....	.....	0 6 8
Paid filing	0 2 6	
Paid for office copy petition under seal	0 10 6	
Attending for same .....	.....	0 6 8
Personal service of the petition on respondent at ——— and mileage .....	.....	0 8 0
25. Perusing respondent's answer .....	.....	0 6 8
31. Attending obtaining appointment to fix permanent alimony and maintenance .....	.....	0 6 8
Paid registrar's fee	0 10 0	
Notice of appointment, copy and service .....	.....	0 4 0
Feb. 10. Attending appointment, when amount of respondent's income ascertained, but appointment adjourned for a week to enable parties to agree as to disposal of house .....	.....	0 13 4

17. Attending adjourned hearing before the registrar, when he fixed the permanent alimony and maintenance, subject to a reduction of £—— fixed for permanent alimony on the respondent putting the petitioner into legal possession of the house	£ s. d.	£ s. d.
18. Attending drawing up order		0 13 4
Paid for same	0 5 0	0 6 8
Copy order for service on the respondent		0 1 4
Service thereof on him at Peckham and mileage.....		0 6 0
Drawing costs and copies (folios 8)		0 8 0
Attending filing		0 6 8
Paid filing	0 2 6	
Attending taxing		0 6 8
Attending for order for payment		0 6 8
Paid for order	0 5 0	
Copy and service of order and mileage		0 6 0
Term fee		1 1 0

7. PETITIONER'S (WIFE) COSTS OF APPLICATIONS TO ENFORCE ORDER FOR ALIMONY AND OF PETITION TO VARY ORDER.

Trinity Sittings, 19 .

July 30. Attending respondent on his calling, when he said he intended applying to reduce the alimony allotted, and we told him of our application to charge his pension, and he offered to pay £—— on account of arrears of alimony and maintenance if we would withdraw the application, and we promised to obtain petitioner's instructions	£ s. d.	£ s. d.
Writing respondent that we would accept £—— on account of overdue alimony and agree to withdraw our proceedings to charge his pension if the £—— paid at once		0 6 8
Attending respondent on his calling, and he paid us £—— on account of alimony, and giving receipt for same		0 3 6
Perusing petition to vary order for alimony served by respondent.....		0 6 8
Perusing affidavit verifying petition to vary order for alimony		0 6 8
Aug. 5. Instructions for answer to petition to vary order for alimony, including copy to file.....		0 6 8
Drawing same		1 0 0
Engrossing for swearing (folios 6)		0 2 0
Attending petitioner on her calling, reading same over to her, and with her before commissioner to be sworn thereto		0 6 8
Paid oath	0 1 6	
Attending filing answer to petition		0 6 8
Paid filing	0 2 6	
Copy answer for respondent		0 2 0
Service thereof		0 2 6
Sittings' fee		0 15 0

Hilary Sittings, 19

	£	s.	d.	£	s.	d.
Jan. 19. Attending appointment before Mr. Registrar						
—— to vary order for alimony, when the registrar directed the respondent to file a further affidavit setting out fully the whole of his sources of income, as the petition did not fully set this out, and appointment adjourned till the —— instant, respondent to file and serve us with a copy affidavit in the meantime	.....			0	13	4
Perusing further affidavit of respondent in support of his petition .....	.....			0	6	8
25. Instructions for affidavit in support of application for garnishee order nisi for non-payment of alimony.	.....			0	6	8
Drawing same .....	.....			0	6	0
Engrossing .....	.....			0	2	0
Attending petitioner on her calling, and with her to be sworn to affidavit .....	.....			0	6	8
Paid oath	0	1	6			
Attending registrar reading over affidavit when he granted order nisi .....	.....			0	6	8
Paid for order nisi	0	5	0			
Attending drawing up order .....	.....			0	6	8
Copy order nisi for service .....	.....			0	1	0
Service thereof personally on manager of —— Bank..	.....			0	5	0
26. Attending hearing of garnishee order nisi when same made absolute on our filing affidavit of service and non-attendance of garnishees .....	.....			0	6	8
Drawing affidavit of service and non-attendance of garnishees .....	.....			0	6	8
Attending to be sworn .....	.....			0	6	8
Paid oath and exhibit	0	2	6			
Marking exhibit .....	.....			0	1	0
Paid filing affidavit of service and non-attendance of garnishees	0	2	6			
Attending filing .....	.....			0	6	8
Attending drawing up order absolute .....	.....			0	6	8
Paid for order	0	5	0			
Copy garnishee order absolute for service .....	.....			0	1	0
Service thereof on the manager of the —— Bank..	.....			0	5	0
27. Attending the manager of the —— Bank on his handing us cash for £—— as ordered by the garnishee order, and giving receipt .....	.....			0	6	8
Attending adjourned hearing to vary order for alimony, when matter further discussed, and registrar required information as to the amount of dividend likely to be paid by the —— Bank, and within what period.....	.....			0	13	4
Writing liquidator of —— Bank for the information required by the registrar .....	.....			0	3	6
Copy of reply from liquidator of —— Bank for respondent, as directed by registrar .....	.....			0	1	0
Writing respondent therewith .....	.....			0	3	6
Attending registrar giving him information received from liquidator of —— Bank .....	.....			0	6	8
On receipt of further letter from liquidator attending registrar therewith, when he thought we had better have the parties before him again before deciding, and directed us to give notice of appointment to respondent.....	.....			0	6	8
Notice thereof, copy and service on respondent.....	.....			0	4	0

Attending further hearing on application to vary order for alimony when same further discussed, and registrar dismissed respondent's application	£ s. d.	£ s. d.
Drawing costs and copies (folios 18) .....	.....	0 6 8
Attending filing .....	.....	0 18 0
Paid filing	0 2 6	0 6 8
Attending for appointment to tax .....	.....	0 6 8
Notice of taxing, copy and service (mileage) .....	.....	0 9 0
Attending taxing .....	.....	0 6 8
Attending agreeing costs .....	.....	0 6 8
Attending for order for payment .....	.....	0 6 8
Paid for order	0 5 0	
Copy and service of order (mileage) .....	.....	0 9 0
Sittings' fee .....	.....	0 15 0
Drawing and engrossing affidavit of service of bill.....	.....	0 6 8
Attending swearing .....	.....	0 6 8
Paid oath and exhibit	0 2 6	
Marking exhibit .....	.....	0 1 0
Paid filing affidavit	0 2 6	

8. PETITIONER'S (WIFE) COSTS OF ORDER DISMISSING MOTION.

	£ s. d.	£ s. d.
189 . March 1. Instructions to oppose motion.....	.....	0 6 8
Perusing affidavit to respondent in support .....	.....	0 5 0
The like exhibit to affidavit .....	.....	1 1 0
Drawing brief to oppose motion .....	.....	0 10 0
Copy correspondence to accompany (folios 10) .....	.....	0 3 4
Attending counsel therewith .....	.....	0 6 8
Fee to Mr. ——— with brief	3 5 6	
The like for conference	1 6 0	
Attending conference .....	.....	0 13 4
5. Attending Court when motion made and dismissed with costs .....	.....	0 13 4
Drawing costs and copies (folios 4) .....	.....	0 4 0
Attending lodging .....	.....	0 6 8
Paid lodging	0 2 6	
Notice of taxing, copy and service, and mileage, serving costs at ——— .....	.....	0 9 0
Attending taxing and agreeing .....	.....	0 6 8
Attending for order for payment .....	.....	0 6 8
Paid for same	0 5 0	
Copy and service of order and mileage.....	.....	0 9 0
Sittings' fee .....	.....	0 15 0

9. COSTS OF THE RESPONDENT (WIFE) TO DATE OF
SETTING DOWN OF ACTION FOR TRIAL.

In the High Court of Justice.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.
(DIVORCE.)

Between, &c.

Hilary Sittings, 19 .

	£	s.	d.	£	s.	d.
Jan. 1. Instructions to defend				0	6	8
Perusing petition				0	6	8
The like copy citation				0	1	8
8. Attending entering appearance				0	6	8
Paid	0	2	0			
Notice thereof, copy and service				0	4	0
Instructions for answer to petition				0	6	8
Drawing and engrossing same				1	0	0
Copy for counsel				0	1	0
Fee to counsel to settle answer	1	3	6			
Attending him				0	3	4
10. Instructions for affidavit in support of answer.....				0	6	8
Drawing and engrossing same				0	6	8
Attending on being sworn thereto				0	6	8
Paid oath	0	1	6			
Attending filing answer and affidavit				0	6	8
Paid filing answer	0	2	6			
The like affidavit	0	2	6			
Copy answer for service				0	1	0
Service thereof				0	3	4
23. Perusing replication				0	6	8
Feb. 5. Drawing bill of costs and copy for taxation (folios 8)				0	5	4
Copy for husband's solicitors				0	2	8
Attending to file				0	6	8
Paid filing	0	2	6			
Copy and service of appointment to tax.....				0	4	0
Attending taxing and agreeing amount of taxed costs, and the registrar fixed the amount to be paid into Court or secured by the husband for further costs...				0	13	4
Attending drawing up order for security				0	6	8
Paid for order and reference fee	0	15	0			
Copy and service				0	3	6
Term fee				0	15	0

10. RESPONDENT'S (WIFE) COSTS ON PETITIONER'S APPLICATION FOR LEAVE TO FILE SUPPLEMENTAL PETITION.

Between A. B., petitioner, and
C. B., respondent, and
E. F., co-respondent.

Hilary Sittings, 19 .

	£	s.	d.	£	s.	d.
Feb. 15. Attending petitioner's summons for leave to file supplemental petition, same adjourned for affidavit	.....			0	6	8
Perusing affidavit of petitioner's solicitors	.....			0	1	4
16. Attending adjourned summons (order made)	.....			0	6	8
20. Perusing supplemental petition	.....			0	6	8
Instructions for answer to supplemental petition	.....			0	6	8
Drawing and engrossing same	.....			1	0	0
Attending filing answer	.....			0	6	8
Paid	0	2	6			
Copy answer for service	.....			0	2	0
Service thereof	.....			0	3	4
Attending searching cause list	.....			0	13	4

Easter Sittings, 19 .

Instructions for brief	.....			1	1	0
Drawing brief (folios 36)	.....			1	16	0
Fair copy for counsel	.....			0	12	0
Fair copy pleadings for counsel (folios 30)	.....			0	10	0
Attending searching cause list	.....			0	13	4

Trinity Sittings, 19 .

July 5. Fee to counsel with brief and clerk	3	5	6			
Attending him	.....			0	6	8
Attending appointing conference	.....			0	3	4
Conference fee to counsel and clerk	1	6	0			
Attending conference	.....			0	13	4
Attending searching cause list	.....			0	13	4
6. Writing respondent informing her that cause will be in paper	.....			0	3	6
7. Attending trial, cause heard	.....			1	1	0
Drawing costs and copy for taxation (folios 9)	.....			0	6	0
Copy for service	.....			0	3	0
Attending in registry filing costs	.....			0	6	8
Paid stamp on filing	0	2	6			
Notice of appointment to tax, copy and service	.....			0	4	0
Attending taxing	.....			0	6	8
Attending agreeing costs as taxed	.....			0	6	8
Drawing payment schedule in duplicate and attending registrar to sign same	.....			0	6	8
Attending paymaster bespeaking cheque	.....			0	6	8
Attending receiving cheque	.....			0	6	8
Term fee	.....			0	15	0
Paid taxing fees	.....				

11. RESPONDENT'S (WIFE) COSTS OF APPLICATION BY
PETITIONER FOR LEAVE TO TAKE CHILDREN OUT OF
THE JURISDICTION OF THE COURT.

Between A. B., petitioner, and
C. B., respondent, and
E. F., co-respondent.

Trinity Sittings, 19 .

	£	s.	d.	£	s.	d.
July 30. Perusing affidavit of petitioner in support of summons for leave to take children out of jurisdiction (folios 10)				0	3	4
Instructions for affidavit of respondent in opposition..				0	6	8
Drawing and engrossing affidavit in opposition (folios 10).....				0	13	4
Copy for service				0	3	4
August 2. Attending respondent on her swearing same				0	6	8
Paid oath	0	1	6			
Copy petitioner's summons for counsel				0	1	0
The like petitioner's affidavit (folios 10)				0	3	4
The like respondent's affidavit (folios 10)				0	3	4
Drawing and copy observations for counsel				0	6	8
Fee to Mr. ——— therewith and clerk	2	4	6			
Attending him				0	6	8
Paid conference fee and clerk	1	6	0			
Attending conference				0	13	4
Attending respondent taking instructions for further affidavit				0	6	8
Drawing and engrossing same (folios 6)				0	8	0
Attending respondent on her swearing same				0	6	8
Paid oath	0	1	6			
Copy for service				0	2	0
Copy for counsel				0	2	0
Paid filing affidavits of respondent (2)	0	5	0			
6. Attending summons, same adjourned to enable respondent to answer further affidavits filed on behalf of petitioner				0	6	8
Perusing further affidavit of petitioner (folios 6)				0	2	0
Copy for counsel				0	2	0
Perusing affidavit of Dr. ——— (folios 3)				0	1	0
Copy for counsel				0	1	0
Instructions for further affidavit by respondent in answer to the affidavits of Dr. ——— and petitioner..				0	6	8
Drawing and engrossing same (folios 6)				0	8	0
Copy for service				0	2	0
Copy for counsel				0	2	0
Attending respondent on her swearing same				0	6	8
Paid oath	0	1	6			
Paid filing	0	2	6			
9. Perusing affidavit of Dr. ——— (folios 10)				0	3	4

Attending adjourned summons when judge made order giving petitioner liberty to take the children out to ———; and, on the application of respondent's counsel, it was conceded that she should be allowed to see the children before they were taken away on certain conditions, and the respondent's costs were allowed, and counsel certified for	£	s.	d.	£	s.	d.
Perusing order				0	6	8
Drawing costs and copy for taxation (folios 15).....				0	2	0
Copy for service				0	10	0
Attending in registry filing costs				0	5	0
Paid stamp on filing	0	2	6	0	6	8
Notice of taxing, copy and service				0	4	0
Attending taxing				0	13	4
Term fee				0	15	0

Table of Fees to be taken in the Court for Divorce and Matrimonial Causes.

CITATION.

On every citation	£	s.	d.
For settling citation, or an abstract thereof for advertisement, or other advertisement:	0	5	0
If 5 folios of 72 words or under	0	2	6
If above 5 folios, for each additional folio or part of a folio..	0	0	3

APPEARANCE.

On entering appearance	0	2	6
On amending appearance	0	2	6

PLEADINGS.

Filing a petition	0	5	0
Filing an answer	0	5	0
Filing a reply	0	5	0
Filing rejoinder or any further replication	0	5	0
Filing act on petition	0	5	0
Filing any writing to the act on petition by way of answer, reply, rejoinder, or conclusion	0	5	0
Filing joinder in demurrer	0	5	0
On amending or reforming pleadings	0	2	6

EVIDENCE.

Filing interrogatories (each set)	0	5	0
Filing deposition of each witness	0	2	6

PROTECTION ORDERS.

Filing application for an order for the protection of a wife's earnings and property	£	s.	d.
For entering the order on such application.....	0	5	0
For the order under seal of the Court	0	10	0

QUESTIONS FOR JURY.

For settling the issues of fact to be tried by a jury	0	10	0
Filing parchment copy of the issues of fact as settled	0	2	6
Filing panel	0	2	6

SETTING DOWN.

Setting a cause down for hearing or trial	0	5	0
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WITHDRAWAL.

On withdrawal of a cause after same is set down for hearing or trial, to be paid by the party at whose instance it is withdrawn.	0	5	0
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SUBPCENA.

On every subpoena	0	2	6
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HEARING OR TRIAL.

On the hearing or trial of a cause:			
From the party setting down the cause for hearing or trial...	1	10	0
If the hearing or trial continues more than one day, for each day:			
From the same party	1	0	0

JUDGE'S NOTES.

Producing the judge's notes	0	5	0
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ENTERING DECREE, VERDICT, OR ORDER.

Entering sentence or final decree in a cause, to be paid by the successful party	0	10	0
Entering verdict, if 5 folios of 72 words or under	0	5	0
If exceeding 5 folios, for each additional folio or part of a folio...	0	1	0
Entering order for the examination of a witness or witnesses....	0	5	0
Entering any decree or order for alimony	0	5	0
Entering order directing how damages shall be applied	0	5	0
Entering order providing for custody, maintenance, or education of children, if 5 folios of 72 words or under	0	5	0
Entering any order made under the authority given by 20 & 21 Vict. c. 85, ss. 32 & 45, and by 22 & 23 Vict. c. 61, s. 5, if 5 folios of 72 words or under	0	5	0
If either of the above orders exceed 5 folios, for each additional folio or part of a folio	0	1	0
Entering any minute, order, or decree in the Court Book other than minutes, orders, or decrees specified	0	2	6
Entering any order of the registrars of the Court of Probate the same fee as would be payable for entering a similar order made by the judge.			

ORDERS.

For any order issuing under the hand of the Judge Ordinary or of one or more of the registrars, except orders made on summons..	£	s.	d.
	0	5	0

BILL OF EXCEPTIONS.

Bill of exceptions signed by the judge	0	5	0
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COMMISSION OR REQUISITION.

On every commission or requisition issuing under seal of the Court	1	0	0
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TAKING EVIDENCE.

For taking the evidence of one or more witnesses before the registrar, and within three miles of the General Post Office, for each day	3	3	0
If beyond that distance, for each day, in addition to travelling expenses	5	5	0
If for part of a day only, such smaller fee as the registrar in his discretion shall think proper.			

REFERENCES TO THE REGISTRARS.

On each reference to ascertain the amount to be paid or secured to a wife to cover her costs. For the registrar's attendance....	0	5	0
For his report thereon	0	2	6
On each reference for any other inquiry before the registrars. For registrar's attendance	1	0	0
For every hour or part of hour after the first hour a further fee of	0	10	0
For the registrar's report, if 5 folios of 72 words or under...	0	5	0
If exceeding 5 folios, for every additional folio or part of a folio	0	2	0

SUMMONSES.

On each summons	0	2	6
For an order on summons, including the entry of same	0	2	6
If a final order in the cause	0	10	0

MOTIONS.

Filing case for motion	0	5	0
Entering any minute or order on motion other than orders specified	0	5	0
If a final order in the cause	0	10	0

WRITS.

Writ of attachment	0	7	6
Writ of sequestration	1	0	0
Writ of fieri facias	1	0	0

APPEALS.

On lodging instrument of appeal	0	10	0
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CERTIFICATE.

For every certificate under the hand of the Judge Ordinary, or of one of the registrars of the principal registry of the Court of Probate	£ s. d.
	0 2 6

FILING.

Filing every notice	0 1 0
Filing exhibits, for each exhibit	0 1 0
Filing every affidavit or other document brought into Court or deposited in the registry for filing which no fee is before specified	0 2 6

SEARCHES.

Search in each Court Book, if within the last five years.....	0 1 0
If at an earlier period than within the last five years.....	0 2 6
In case the Court Books to be searched or the documents required are not in the registry, in addition to the above..	0 2 6

OFFICE COPIES AND EXTRACTS.

For every office copy or extract of a minute, order, or decree entered in a cause, or of any document filed in a cause, or deposited in the registry:	
If 5 folios of 72 words or under	0 2 6
If exceeding 5 folios of 72 words, per folio	0 0 6
If on parchment, in addition to the above, for every folio and part of a folio of 72 words	0 0 3
For the seal of the Court affixed to any minute, order, or decree, or to any office copy	0 5 0

TAXING COSTS.

Taxing every bill of costs:	
If 5 folios of 72 words or under.....	0 2 6
If exceeding 5 folios of 72 words	
When taxed as between party and party, for every folio and part of a folio of 72 words	0 0 6
When taxed as between practitioner and client, for every folio and part of a folio of 72 words	0 1 0
For postponement of appointment for taxation of costs, to be paid by the party at whose instance the appointment is postponed:	
If the bill of costs is 5 folios of 72 words or under.....	0 1 0
If exceeding 5 folios of 72 words, and under 15 folios.....	0 2 6
If exceeding 15 folios	0 5 0

APPOINTMENT OF OFFICERS.

On appointment of a commissioner for taking oaths	1 0 0
For registering appointment of a commissioner for taking oaths in the Court of Chancery	0 5 0

OATHS.

For administering an oath to each deponent	0 1 0
For marking each exhibit	0 1 0

AFFI-
DAVITS.

Practice as to Evidence.

[See on the subject of Evidence generally, Part I., Chap. XVII., ante, pp. 251—276.]

Evidence in a matrimonial cause taken on affidavits.

Power to allow the evidence in a matrimonial cause to be taken wholly or partially by affidavit is given by 20 & 21 Vict. c. 85, s. 46. (*See ante*, p. 251.)

Time for filing.

By rule 51, "When the Judge Ordinary has directed that all or any of the facts set forth in the pleadings be proved by affidavits, such affidavits shall be filed in the registry within eight days from the time when such direction was given, unless the Judge Ordinary shall otherwise direct."

In undefended cases.

This rule was amended by rule 188, which is in the following terms:—

"In an undefended cause, when directions have been given that all or any of the facts set forth in the petition be proved by affidavits, such affidavits may be filed in the registry at any time up to ten clear days before the cause is heard."

Counter affidavits: time for filing.

By rule 52, "Counter affidavits as to any facts to be proved by affidavit may be filed within eight days from the filing of the affidavits which they are intended to answer."

Copies to be delivered to other parties on day of filing.

By rule 53, "Copies of all such affidavits and counter affidavits shall on the day the same are filed be delivered to the other parties to be heard on the trial or hearing of the cause, or to their proctors, solicitors, or attorneys."

Affidavits in reply cannot be filed without leave.

By rule 54, affidavits in reply to such counter affidavits cannot be filed without permission of a registrar.

Order to cross-examine on; application for.

And by rule 55, "Application for an order for the attendance of a deponent for the purpose of being cross-examined in open Court shall be made to the judge, on summons."

The instances in which the Court has allowed cases to be proved wholly by affidavits have been extremely rare, but it has not been uncommon to allow a case to be partly proved by affidavits. (*See ante*, pp. 257, 258.)

Affidavits.

Cases partly
verified by.

The following rules apply to affidavits generally:—

By rule 138, “Every affidavit is to be drawn in the first person, and the addition and true place of abode of every deponent is to be inserted therein.”

Must be sworn
in first person,
and give true
address and
description of
deponent.

[If the deponent gives an illusory address, or no address at all, the Court will not allow the affidavit to be used: *Hyde v. Hyde, Fellgate and others* (1888), 59 L. T. 523. The affidavit of a married woman should state the description of her husband: *Ellam v. Ellam* (1889), 58 L. J. P. 56; 61 L. T. 338.

The wording of this rule is not very intelligible, but it means that the description of the deponent must be added to his address.]

The following descriptions, amongst others, have been held to be sufficient: “Merchant”; “manufacturer”; “managing clerk to, &c.”; “clerk to ———”; “of no occupation.” Deponent must state his occupation (if any).

Good
descriptions.

The following have, amongst others, been held to be insufficient: “Assessor”; “acting as managing clerk to, &c.”; “articled clerk”; “solicitor’s clerk” (unless the address given be certified to be the private address of the deponent, the form should be “clerk to A. B., &c.”); “gentleman”; “esquire.”

Bad
descriptions.

[*For forms of affidavits, see Form 7, p. 298; Form 15, p. 307; Form 18, p. 313; Form 19, p. 314; Form 27, p. 329; Form 29, p. 334; Form 30, p. 338; Form 39, p. 352; Form 44 (2), (3), pp. 364, 365; Form 46, p. 371; Form 47, p. 372; Form 48, p. 372; Form 57, p. 393; Form 63, p. 408; Form 87, p. 450; Form 88, p. 451; Form 89, p. 455; Form 90, p. 459; Form 105, p. 522; Form 114, p. 556; Form 118, p. 612; Form 127, p. 632.]*

Affidavits,
forms of.

Affidavits.

FORM 117.

General Form of Jurat.

Jurat, general
form of. Sworn at (*insert full particulars of place of swearing*)
the day of , 1911.

Before me,

(Signature and full description of the
authorized person before whom the
affidavit is sworn.)

*[Where an affidavit has to be re-sworn, it is not necessary
to strike out the first jurat, but merely to write out a fresh
one.]*

Affidavit,
joint; names
of persons
must be
inserted in
jurat, except
where all
sworn at one
time by same
officer.

By rule 139, "In every affidavit made by two or more deponents, the names of the several persons making it shall be inserted in the jurat, except that if the affidavit of all the deponents is taken at one time by the same officer, it shall be sufficient to state that it was sworn by both (or all) of the above-named deponents."

[The wording of the above rule is confusing. It merely means that if the jurat is in the following form, "Sworn by both (or all) the above-named deponents," it will suffice.]

Interlineations, alterations, or erasures in body of.

By rule 140, "No affidavit having, in the jurat or body thereof, any interlineation, alteration, or erasure, shall, without leave of the Court or of one of the registrars, be filed or made use of in any matrimonial cause or matter, unless the interlineation or alteration—other than by erasure—is authenticated by the initials of the officer taking the affidavit, nor, in the case of an erasure, unless the words or figures appearing at the time of taking the affidavit to be written on the erasure are re-written and signed or initialled in the margin of the affidavit by the officer taking it."

By blind or illiterate deponents.

By rule 141, "Where an affidavit is made by any person who is blind, or who, from his or her signature or otherwise, appears to be illiterate, the registrar, commis-

sioner, or other authority before whom such affidavit is made, is to state in the jurat that the affidavit was read in the presence of the party making the same, and that such party seemed perfectly to understand the same, and also made his or her mark or wrote his or her signature thereto in the presence of the registrar, commissioner, or other authority before whom the affidavit was made.”

Affidavits.

Ibid.

The form of jurat in this case will be “Sworn by the above-named A. B. at , on the day of , 19 , after this affidavit had been read over to him (or her) when he (or she) seemed perfectly to understand the same, and made his (or her) mark thereto in my presence.”

Form of jurat.

The rules are silent as to the practice where a deponent is deaf and dumb. If the deaf and dumb deponent can read and write the matter is simple. If otherwise, the commissioner or other authority must be satisfied by an interpreter that such deponent understands fully what he or she is doing. In either case the course that has been pursued should be clearly set out in the jurat. (*For form of oath of interpreter, see post, p. 619.*)

Deaf and dumb deponent.

The mention in the above rule of the “authority before whom the affidavit was made,” leads naturally to the consideration of who the proper authorities to swear affidavits are.

Affidavits, before whom sworn.

The matter is at present regulated by 52 Vict. c. 10 (Commissioners for Oaths Act, 1889); and 54 & 55 Vict. c. 50 (Commissioners for Oaths Act, 1891), both of which statutes are printed *in extenso* in Appendix B. to the present edition.

Commissioners for Oaths Acts, 1889, 1891.

[By 52 Vict. c. 10, sects. 20 to 23 inclusive of 21 & 22 Vict. c. 108, are repealed.]

In England affidavits in matrimonial causes may be sworn before any commissioner to administer oaths in the Supreme Court of Judicature; any registrar or district registrar, or duly authorized officer of the Probate, Divorce and Admiralty Division; and by 20 & 21 Vict. c. 77,

Before whom sworn in England.

Affidavits.

In Scotland,
Ireland, Isle
of Man,
Channel
Islands,
Colonies, &c.

s. 27, a surrogate of any Ecclesiastical Court acting as such on January 21st, 1858, if any are still to be found.

*"In Scotland, Ireland, Isle of Man, Channel Islands, Colonies, and any place out of England under the dominion of His Majesty.—*Before any Court, judge, notary public, or any person lawfully authorized in such country to administer oaths. And also in the Isle of Man and Channel Islands, before certain other authorized persons.

In foreign
parts outside
H.M. domi-
nions.

*"In foreign parts out of His Majesty's dominions.—*Before every British ambassador, envoy, minister, chargé d'affaires, secretary of embassy or legation, consul, vice-consul, acting consul, pro-consul, and consular agent. Where there is no such person, before any foreign local magistrate or other person having authority to administer an oath there."

British consul
in Germany
forbidden to
administer
oath.

[Where by German law a British consul is not allowed to administer an oath, the affidavit may be sworn before a German judge: *In the Goods of Fawcus* (1884), 9 P. D. 241; 54 L. J. P. 47.]

Before whom
not to be
sworn.

By rule 142, "No affidavit is to be deemed sufficient which has been sworn before the party on whose behalf the same is offered, or before his or her solicitor, or before a partner or clerk of his or her solicitor."

By rule 143, "Solicitors, and their clerks respectively, if acting for any other solicitor, shall be subject to the rules and regulations in respect of taking affidavits which are applicable to those in whose stead they are acting."

Must be
properly
stamped.

By rule 144, "No affidavit can be read or used unless the proper stamps to denote the fees payable on filing the same are delivered with such affidavit."

Where special
time fixed for
filing.

By rule 145, "Where a special time is fixed for filing affidavits, no affidavit filed after that time shall be used unless by leave of the judge."

And by rule 146, "The above rules and regulations in respect to affidavits shall, so far as the same are

applicable, be observed in respect to affirmations and declarations to be read or used in the Court for Divorce and Matrimonial Causes.” Affidavits.

[Only copies of affidavits need be served unless otherwise specifically directed or ordered.] Copies only need be served.

Oaths and affirmations are now regulated as to their form by 51 & 52 Vict. c. 4 (Oaths Act, 1888); and by 9 Edw. VII. c. 39 (Oaths Act, 1909), which are printed *in extenso* in Appendix C, pp. 723, 765. Oaths and Affirmations.
Oaths Acts, 1888, 1909.

The usual form of oath when swearing a deponent to an affidavit is:— Usual form of oath for affidavit.

“You do swear that this is your true name and handwriting, and that the contents of this affidavit are true. So help you God.” The book is then kissed.

But by sect. 5 of 51 & 52 Vict. c. 4, deponents are allowed to swear in the Scotch form. Swearing in Scotch form.

In that case no book is used, but the deponent lifts up his right hand above his head and repeats the oath after the person who administers the oath to him. The form generally given is:—

“I swear to Almighty God, that the contents of this my affidavit are true.” Oath, Scotch form, observations as to.

Sect. 5 of the Oaths Act, 1888, merely gives permission to any person to whom an oath is administered to swear with uplifted hand, if he desires to do so, “in the form and manner in which an oath is usually administered in Scotland.” Oaths Act, 1888, s. 5.

The full Scotch form is—

“I swear to Almighty God, as I shall answer to Him at the Great Day of Judgment,” Proper form.

and there certainly is nothing in the statute to justify its curtailment.

Affidavits.
Affirmations,
form of.

If the deponent desires to affirm, the form will be as follows:—

“I, A. B., do solemnly, sincerely and truly declare and affirm that the contents of this my affidavit are true:”

and the form in lieu of jurat will be—

“Affirmed at this day of , 1911.
 Before me, &c.”

[See 51 & 52 *Vict. c. 46, ss. 2, 4.*]

COMMISSIONS.

Court may
 issue commis-
 sions or give
 orders for
 examination
 of witnesses
 abroad or
 unable to
 attend.

Sect. 47 of the Matrimonial Causes Act, 1857 (20 & 21 *Vict. c. 85*), provides for the examination of witnesses—who are abroad or unable to attend—by examiners appointed by the Court: “Provided, that where a witness is out of the jurisdiction of the Court, or where, by reason of his illness or from other circumstances, the Court shall not think fit to enforce the attendance of the witness in open Court, it shall be lawful for the Court to order a commission to issue for the examination of such witness on oath, upon interrogatories or otherwise, or if the witness be within the jurisdiction of the Court, to order the examination of such witness on oath, upon interrogatories or otherwise, before any officer of the said Court, or other person to be named in such order for the purpose; and all the powers given to the Courts of Law at Westminster by the Acts of the thirteenth year of King George the Third, Chapter sixty-three, and of the first year of King William the Fourth, Chapter twenty-two, for enabling the Courts of Law at Westminster to issue commissions and give orders for the examination of witnesses in actions depending in such Courts, and to enforce such examination, and all the provisions of the said Acts, and of any other Acts for enforcing or otherwise applicable to such examination and the witnesses examined, shall extend and be

applicable to the Court and to the examination of witnesses under the commissions and orders of the said Court, and to the witnesses examined, as if such Court were one of the Courts of Law at Westminster, and the matter before it were an action pending in such Court.”

Commissions.

When the order is for the examination of a witness outside the jurisdiction of the Court, it is termed “*a commission*”; when it is for the examination of a witness within the jurisdiction of the Court, it is termed “*an examination*.”

Explanation of terms.

Commissions or requisitions to examine witnesses are issued whenever it is shown to the satisfaction of the Court that the witness whose evidence it is desired to take cannot well be brought into Court, or if it is probable that his evidence would be lost if not taken at once. They will be ordered in cases where witnesses are about to leave the country, are likely to die, or are incapacitated by illness, old age, or infirmity, or for any other good and valid reason from coming into Court.

When issued.

[On being satisfied by affidavit of the urgency of the matter, the Court gave a wife leave to send a commission abroad *before service of citation*, at her own expense, reserving the question of costs and also of the admissibility of such evidence at the trial (*Brown and another v. Brown* (1864), 33 L. J. P. 203, followed): *Vallentine v. Vallentine*, (1901) P. 283; 70 L. J. P. 89; 85 L. T. 171.]

Issued before service of citation.

The following rules apply to commissions or requisitions for the examination of witnesses out of the jurisdiction of the Court:—

By rule 132, “Application for a commission or requisition to examine witnesses who are out of the jurisdiction of the Court is to be made by summons, or if on behalf of a petitioner proceeding in default of appearance without summons, before one of the registrars, who will order such commission or requisition to issue or refer the application to the judge, as he may think fit.”

Application for, to be made by summons, except in undefended cases.

[If a cause is actually in the list, at all events if it is

Commissions.

approaching its turn for hearing, the registrar usually refers the matter to the judge.

Affidavit must set out names of witnesses.

Every affidavit on which an application to examine witnesses in or out of the jurisdiction is founded, should set out the names of the witnesses it is proposed to examine: *Ryves and Ryves v. Attorney-General* (1865), L. R. 1 P. & D. 23; 35 L. J. P. 6; 13 L. T. 305.]

FORM 118.

Affidavit in support of summons, &c. to examine witness.

Affidavit in support of Summons for Commission, &c. to examine Witness.

[Heading in Cause.]

I, of , in the county of , make oath and say, that,—

1. I am the solicitor for the petitioner in this suit, and have the management thereof.
2. On the day of , A.D. 19 , the petitioner filed his petition in this suit alleging against the respondent that (*state grounds of petition*), and praying (*as the case may be*).
3. On the day of , A.D. 19 , the respondent filed her answer thereto in which (*state effect of answer*).
4. Issue was joined herein on the said answer on the day of .
5. W. W., of , is a material and necessary witness for the petitioner as I am advised and verily believe, and I am advised and verily believe that the petitioner cannot safely proceed to trial without his evidence.
6. That the said W. W. is dangerously ill and not expected to recover (*or whatever may be the ground for applying for the commission to examine: in case of illness, there should be an affidavit of a medical man to the fact, or else a certificate obtained from him and deposed to*).

Sworn, &c.

[*An affidavit showing the necessity of the commission or examination is imperative in every case, whether the summons is by consent or not, as well as in cases where the petitioner is proceeding in default (see rule 132, supra).*] Commissions.
Affidavit necessary in every case.

By rule 133, "A commission or requisition for examination of witnesses may be addressed to any person to be nominated and agreed upon by the parties in the cause and approved of by the registrar, or for want of agreement to be nominated by the registrar to whom the application is made."

Commissioner to be agreed upon by parties, and approved by registrar, or nominated by registrar, for want of agreement.
Wrongly addressed.

[Where a commission was addressed to "The Judge of the Supreme Court of Calcutta," whereas it should have been addressed to "The Judges of the High Court of Judicature, at Fort William, in Bengal," the "Supreme Court of Calcutta" having been abolished, it was held a sufficient description: *Wilson v. Wilson* (1884), 9 P. D. 8; 49 L. T. 430.]

By rule 134, "The commission or requisition is to be drawn up and prepared by the party applying for the same, and a copy thereof shall be delivered to the parties entitled to cross-examine the witnesses to be examined thereunder two clear days before such commission or requisition shall issue, under seal of the Court, and they or either of them may apply to one of the registrars by summons to alter or amend the commission or requisition, or to insert any special provision therein, and the registrar shall make an order on such application or refer the matter to the judge."

How prepared.
Altering and amending of.

[Notice served on respondent's solicitor at 2 p.m. on Saturday, in London, that witness was to be examined at Bath on the following Monday, held insufficient, and deposition rejected by Court: *Fitzgerald v. Fitzgerald* (1863), 3 S. & T. 400; 33 L. J. P. 39; 10 L. T. 510.] Insufficient notice of examination of witness.

By rule 135, "Any of the parties to the cause may apply to one of the registrars by summons for leave to join in a commission or requisition, and to examine witnesses thereunder; and the registrar to whom the

Any party to cause may apply for leave to join in.

Commissions.

application is made may direct the necessary alterations to be made in the commission or requisition for that purpose, and settle the same, or refer the application to the judge."

Not to issue without direction of registrar, after issue of summons by other parties for leave to join in.

By rule 136, "After the issuing of a summons to show cause why a party to the cause should not have leave to join in a commission or requisition, such commission or requisition shall not issue under seal without the direction of one of the registrars."

Commission (or examination), wife's costs of.

Provision for securing.

And by rule 137, "In case a husband or wife shall apply for and obtain an order or a commission or requisition for the examination of witnesses, the wife shall be at liberty, without any special order for that purpose, to apply by summons to one of the registrars to ascertain and report to the Court what is a sufficient sum of money to be paid or secured to the wife to cover her expenses in attending at the examination of such witnesses in pursuance of such order, or in virtue of such commission or requisition, and such sum of money shall be paid or secured before such order or such commission or requisition shall issue from the registry, unless the judge, or one of the registrars in his absence, shall otherwise direct."

[See also rule 198.]

By rule 198, amending rule 137, "The registrar to whom a commission or requisition for examination of witnesses is referred for settlement, on application on behalf of the wife, may proceed at once and without summons to ascertain what is a sufficient sum of money to be paid or secured to her to cover her expenses in attending at the examination of such witnesses, and shall thereupon issue an order upon the husband to pay or secure the said sum within a time to be fixed in such order."

FORM 119.

Commissions.**Commission for Examination of Witnesses.**

In the High Court of Justice,
 Probate, Divorce, and Admiralty Division.
 (Divorce.)

A. B. v. C. D.

Or,

Between A. B., petitioner, and
 C. D., respondent.

For examination of witnesses, form of.

GEORGE V., by the grace of God of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the seas, King, Defender of the Faith.

To (*here set forth the name and proper description of the commissioner*), greeting.

WHEREAS a certain cause is now depending in the Probate, Divorce, and Admiralty Division of our High Court of Justice between A. B., petitioner, and C. B., respondent, and R. S., co-respondent, wherein the said A. B. has filed his petition praying for a dissolution of his marriage with the said C. B. (*or otherwise, as in the prayer of the petition*). And whereas by an order made in the said cause on the day of , 19 , on the application of the said A. B. it was ordered that a commission (*or requisition*) should issue under seal of our said Court for the examination of (*here insert name and address of one of the persons to be examined*) and others as witnesses to be produced on the part of the said A. B., the petitioner, in support of his said petition (saving all just exceptions). Now know ye that we do by virtue of this commission (*or requisition*) to you directed, authorize (*or request*) you within thirty days after the receipt of this commission (*or requisition*) at a certain time and place to be by you appointed for that purpose with power of adjournment to such other time and place as to you shall

Commissions.

For examination of witnesses, form of.

seem convenient, to cause the said witnesses to come before you and to administer to the said witnesses respectively an oath truly to answer such questions as shall be put to them touching the matters set forth in the said petition (a true and authentic copy whereof, sealed with the seal of our said Court, is hereunto annexed), and such oath being administered we do hereby authorize (*or* request) and empower you to take the examination of the said witnesses touching the matters set forth in the said petition, and to reduce the said examination or cause the same to be reduced into writing. And that for the purpose aforesaid you do assume to yourself some notary public or other lawful scribe as and for your actuary in that behalf if to you it should seem meet and convenient so to do. And the said examination being so taken and reduced into writing as aforesaid, and subscribed by you, we do require (*or* request) you forthwith to transmit the said examination, closely sealed up, to the Divorce Registry of our said Court at Somerset House, Strand, in the county of Middlesex, together with these presents. And we do hereby give you full power and authority to do all such acts, matters, and things as may be necessary, lawful, and expedient for the due execution of this our commission (*or* requisition).

Dated at London the day of , in the year of our Lord one thousand nine hundred and , and in the year of our reign.

(Signed) X. Y., Registrar.

[The above is taken from the Appendix to the official copy of the Rules.]

Brought in
draft to
Divorce
Registry to
be settled by
registrar.

Having been prepared by the solicitor for the party applying for it pursuant to rule 134, the commission is brought in draft to the Divorce Registry to be settled by the registrar, and afterwards engrossed on parchment and returned to the registry with the draft and præcipe. These are all then forwarded to the registrar who settled

them, for his signature. The commission, draft, &c. is then sent to be sealed, and can be obtained the next day at the office of the sealer at Somerset House.

Commissions.

A copy of the petition under seal, and any other pleading necessary for the commissioner to have at the examination, should be obtained and accompany the commission.

Copy of petition and other necessary documents to be sent to commissioner.

If it is desired to stay the hearing of the case until the return of the commission, it should form part of the application on the hearing of the summons.

Staying proceedings.

A commission is sometimes directed to A. B., or some fit and proper person to be nominated by him; and in the event of A. B. not acting himself, the appointment by him of a nominee should either be endorsed on the commission or be annexed to it.

Appointment by commissioner of his nominee.

By virtue of the within commission to me directed, I, A. B., of hereby nominate C. D., of , to take such commission.

Form of nomination.

(Signed) A. B.

The commission is sent out by the solicitor or party in person who has obtained it, either to some local solicitor or other agent, with any instructions he may think necessary, or else to the commissioner direct.

Commission sent out by solicitor or party in person.

On receipt of the commission the commissioner should arrange some convenient appointment for the attendance of and examination of the witnesses, to whom notice of such appointment should be at once given.

Duties of commissioner.

[See as to notice, *Fitzgerald v. Fitzgerald* (1863), 3 S. & T. 400; 33 L. J. P. 39; 10 L. T. 510.]

The commissioner, as provided by the commission, will administer to each witness the following oath:—

Oath of witness.

“You are true answer to make to all such questions as shall be asked you, without favour or affection to either party, and therein you shall speak the truth, the whole truth, and nothing but the truth. So help you God.”

[Every commissioner and examiner is empowered to Swearing or affirming.

Commissions. *administer oaths and affirmations for the purposes of such commission or examination. As to swearing witnesses in the Scotch form, and as to oaths and affirmations generally, see ante, pp. 609, 610.]*

Evidence, how taken. The evidence should be taken in narrative form, not question and answer, unless objection is raised; then the question should be set out, as also the answer. The witness should sign each page of his deposition after the same has been read over to him.

Exhibits. Any documents, letters, writings or photographs produced at the examination should be marked by the commissioner and returned with the commission.

Appointment of clerk or scribe. Commissioners and examiners as a rule take down the evidence themselves; but it is competent to them, if they so please, to appoint a clerk or scribe to take down the depositions for them.

If such clerk or scribe is appointed the commissioner should administer the following oath to him, unless he desires to be sworn in the Scotch form or to affirm (*as to which, see ante, pp. 609, 610*), in which case the necessary alterations in the wording must be made:—

Oath of clerk or scribe. “You shall truly, faithfully, and without partiality to any or either of the parties in this cause, take, write down, transcribe and engross all and every the questions which shall be exhibited or put to all and every witness and witnesses, and also the depositions of all and every such witness and witnesses produced before and examined by the said commissioners named in the commission within written, as far forth as you are directed and employed by the commissioners to take, write down, transcribe or engross the said questions and depositions. So help you God.”

Appointment of clerk or scribe must be in writing, and be The clerk or scribe must be appointed by the commissioner in writing, and such appointment must specify that the commissioner appoints “A. B., of , to be my

clerk (*or* 'scribe' *or* 'actuary') for the purpose of reducing into writing the examination of the witnesses," and it must also set out particulars of the commission, and be dated and signed by the commissioner. The appointment is returned with the commission.

Commissions.

returned
with the
commission.

If any of the witnesses do not understand the English language, then the examination shall be taken in English through the medium of an interpreter, to be nominated by the commissioner present at the examination and to be previously sworn, according to his religion by or before the said commissioner truly to interpret the questions to be put to the witness and the answers thereto.

Foreign
witnesses not
understand-
ing English.

"You shall truly and faithfully, and without partiality to any or either of the parties in this cause, and to the best of your ability, interpret and translate the oath or oaths, affirmation or affirmations which shall be administered to, and all and every the questions which shall be exhibited or put to, all and every witness and witnesses produced before and examined by the commissioners named in the commission within written, as far forth as you are directed and employed by the said commissioners, to interpret and translate the same out of the English into the language of such witness or witnesses, and also in like manner to interpret and translate the respective depositions taken and made to such questions out of the language of such witness or witnesses into the English language. So help you God."

Interpreter,
oath of.

[*As for affirming or swearing in the Scotch form, see ante, pp. 609, 610.*]

If it is desired to take the deposition of a deaf and dumb witness, an interpreter skilled in the deaf and dumb language, &c. must be employed. The above oath, with the necessary modifications, will be administered to him.

Deaf and
dumb witness;
interpreter.

Commissions.

Return of
commission.

Having taken the evidence, the commissioner returns the deposition into the Divorce Registry *in a sealed packet*, together with any letters, documents, photographs, &c., that have been produced at the commission, and the following certificate under his hand and seal:—

Certificate of
commissioner.

I, A. B., the commissioner appointed by the commission dated day of , 1911, hereby certify that the following witnesses , , , , having been first duly sworn by me, were examined before me at , on the day of , 1911, and that the following is the evidence taken upon such examination.

L.S.

A. B.,
Commissioner.

Return of
commission ;
breaking
seals of
packet at
Divorce
Registry.
Registrar's
minute of
contents.

On the commission being returned to the registry, the seals of the packet containing it are broken, and the packet opened by one of the principal registrars.

One of the clerks in the registry then draws up a minute containing a list of the documents contained in the packet, and directing them to be filed. This minute, having been signed by the registrar who opened the packet, is annexed to the depositions and other documents contained in it.

No notice sent
of return of
commission ;
parties must
ascertain at
Divorce
Registry
when
returned.

No notice is sent to anyone of the return of the commission. The solicitor or party in person who obtained it must find out at the Divorce Registry whether it has been returned, and as soon as the minute is complete he must file the commission and documents.

Commission and
documents to be
filed by party
obtaining
commission ;
after filing can
be inspected and
office copies
ordered.

After they are filed either party can see the commission and documents, inspect them, and obtain office copies of them if so desired.

The commission and documents are sent at once to the Court, whether the case is stayed or not.

Commission, &c.
documents sent
at once to the
Court.

A "requisition," or "letter of request," as will be seen by the form given below, is issued when the Court, instead of issuing a commission of its own authority, "requests" the foreign tribunal within whose jurisdiction the witnesses it is desired to examine are residing to do so in its place.

The following form is adapted from "The Annual Practice, 1913" (London: Sweet & Maxwell, Limited, 3, Chancery Lane, and Stevens & Sons, Limited, 119, 120, Chancery Lane, W.C.), Appendix K, No. 37 b, Part II., p. 1460:—

FORM 120.

Requisition or Request for Commission.

(To the President and Judges of, &c., &c., or as the case may be.)

REQUISITIONS.

Or "Letters of Request."

Form of.
Annual
Practice, 1913,
Part II.
p. 1460.

WHEREAS a suit is now pending in the Probate, Divorce, and Admiralty Division of the High Court of Justice in England, wherein A. B. is petitioner, and C. D. is respondent, and E. F. is co-respondent: And the said petitioner in his petition prays to have his marriage with the said C. D. dissolved on the ground of her adultery with the said E. F. (*or as the case may be*): And whereas it has been represented to the said Court that it is necessary for the purposes of justice, and for the due determination of the said suit, that the following persons should be examined as witnesses upon oath touching the matters in dispute in the said suit; that is to say:—

G. H., of ,
I. J., of , and
K. L., of .

And it appearing that such witnesses are resident within the jurisdiction of your honourable Court.

Now I, Sir Samuel Evans, as the President of the said Probate, Divorce, and Admiralty Division of the said High Court of Justice, have the honour to request and

Requisitions.

Form of,
adapted from
"Annual
Practice,
1913,"
Part II.,
p. 1460.

do hereby request that for the reasons aforesaid, and for the assistance of the said High Court of Justice, you, as the President and judges of the said , or some one or more of you, will be pleased to summon the said witnesses (and such other witnesses as the agents of the said petitioner, respondent, and co-respondent (*or as the case may be*) shall humbly request you in writing so to summon) to attend at such time and place as you shall appoint before some one or more of you, or such other person as, according to the procedure of your Court, is competent to take the examination of witnesses, and that you will cause such witnesses to be examined upon the interrogatories which accompany this letter of request (*or vivâ voce*) touching the said matters in question in the presence of the agents of the petitioner, respondent, and co-respondent (*or as the case may be*), or such of them as shall, on due notice given, attend such examination.

And I further have the honour to request that you will be pleased to cause the answers of the said witnesses to be reduced into writing, and all books, letters, papers and documents produced upon such examination to be duly marked for identification, and that you will be further pleased to authenticate such examination by the seal of your tribunal, or in such other way as is in accordance with your procedure, and to return the same together with such request in writing, if any, for the examination of other witnesses, through His Majesty's Secretary of State for (Foreign Affairs) for transmission to the said High Court of Justice in England.

[If the request is directed to a British colony, the words "the colonies" should be substituted for "foreign affairs." If the request is directed to the High Court in India, it should be transmitted direct, and the concluding sentence of the form altered accordingly.]

Must be
signed by
president.

The letter of request is signed by the president, and when sealed is left at the registry with all necessary

papers, and is sent from thence direct to the Secretary of State for Foreign Affairs or the Colonies, as the case may be, without the intervention of the solicitor.

The following is extracted from the Annual Practice, 1913, "Miscellaneous Practice Rules, 13a," Part IX., p. 2186. It applies equally to the Probate, Divorce, and Admiralty Division, and to the other Divisions of the High Court.

"Before any letter of request is sealed in the writ department, the solicitor applying for such letter of request must file a written undertaking in the words, and to the effect following:—

"[*Title of cause or matter.*]

"'I (or we) hereby undertake to be responsible for all expenses incurred by H. M. Secretary of State (for Foreign Affairs, or the Colonies, *as the case may be*), in respect of the execution of the letter of request issued herein on the day of , 19 , and on receiving due notification of the amount of such expenses, I undertake to pay the same to the senior master' (*or in a divorce suit 'registrar'.*)"

[*Approved by the Lord Chief Justice, and the President of the P. D. and A. D.*

In all other respects the practice is the same as "Commissions." For fees and costs, see ante, pp. 540—603.]

Requisitions.

When sealed left at Divorce Registry and forwarded from thence direct to Secretary of State.

Undertaking by solicitor to pay expenses of Secretary of State.

Form of, from Annual Practice, 1913, Part IX. p. 2186.

Applies equally to all Divisions of High Court.

Practice in other respects same as commissions.

The following rules relate to "*examinations*" as distinguished from "*commissions*."

By rule 129, "Application for an order for the immediate examination of a witness who is within the jurisdiction of the Court is to be made to the judge, or to the registrars in his absence, by summons, or if on behalf of a petitioner proceeding in default of appearance of the parties cited in the cause, without summons before one of

EXAMINATIONS.

As distinguished from commissions, application for by summons.

Examinations.

Summons,
before whom
heard.

Affidavit in
support,
contents of.

Affidavit
always
necessary.
Further
evidence.

Appointment
of examiner;
evidence to
be taken
vivâ voce.

Notice to
opposite
party.

the registrars, who will direct the order to issue or refer the application to the judge as he may think fit."

The summons is usually before the registrar, unless the application is to examine one of the parties in the cause, or if the summons is taken out after the cause is in the list for hearing (at all events, if the trial is near at hand), in either of which cases it must be before the judge.

The summons must be supported by an affidavit (generally made by the solicitor) on behalf of the party applying, setting out the full name and address of the person it is proposed to examine, and stating (1) that such person is a material witness, and that the applicant could not proceed safely to trial without his or her evidence; and (2) the reason or reasons why it is necessary to take the evidence immediately, as that the witness is unable to attend in open Court on account of age or infirmity or serious illness, or that he or she is about to leave the country.

As in the case of a commission an affidavit is still necessary, whether the summons is consented to or not.

Sometimes further evidence is required, as of a doctor in the case of sickness. In such a case the doctor either makes a separate affidavit or joins in the affidavit of the solicitor or other person making it, or else gives a signed certificate in writing, and his handwriting is sworn to by the other deponent.

By rule 130, "Such witness shall be examined *vivâ voce*, unless otherwise directed, before a person to be agreed upon by the parties in the cause or to be nominated by the judge or by the registrars to whom the application for the order is made."

And by rule 131, "The parties entitled to cross-examine the witness to be examined under such an order shall have four days' clear notice of the time and place appointed for the examination, unless the judge or the registrars to whom the application is made for the order shall direct a shorter notice to be given."

The following is suggested as a form of order for the "examination" of a witness (as distinguished from a commission), and is adapted from the forms as to commissions and examinations in the Annual Practice, 1913, Appendix K., Part II., p. 1458; though the suggestion is not of much value, as the registry uses its own form:—

FORM 121.

Order for the "Examination" of a Witness or Witnesses.

Order for
"examina-
tion" (as
distinguished
from com-
mission) of
witnesses
form of.

[*Heading as, e.g., in Form 32, ante, p. 344.*]

Upon hearing the solicitors on both sides, and upon reading the affidavit of A. B., sworn (*or filed herein, as the case may be*) on the day of , 19 , it is ordered that C. D., a witness on behalf of the said petitioner (*or respondent, or co-respondent*), be examined *vivâ voce* before J. H. M., Esq., barrister-at-law (*or as the case may be*), special examiner, at such time and place as the said special examiner shall think fit; and that the said special examiner shall give or cause to be given four days' notice to the parties, or their solicitors or agents, of the time and place where the examination is to take place;

[*If the judge or registrar to whom the application is made directs a shorter notice to be given (see rule 131), this clause must be altered accordingly. Sometimes when the matter is urgent the order runs that the witness "be forthwith examined before, &c.," in which case this clause is omitted altogether.*]

and that the said respondent shall be at liberty to cross-examine the said witness; and that the said witness shall be further examined before the said examiner if he shall think fit.

And it is further ordered that it shall and may be lawful for the said examiner to make, if need be, a special report touching the said examination, and that the examination so taken, and other proceedings had before him,

Examinations.

Order for
examination,
form of.

shall be filed in the Divorce Registry of this Court, at Somerset House, Strand, certified under his hand and seal, on or before the day of , 19 ; and that either party may be at liberty to take office copies of the said examination, and that the same, or an office copy or copies thereof, may be read and given in evidence at hearing (or "trial") of this cause, saving all just exceptions.

Dated the day of , 19 .

(Signed by the judge or registrar, whichever made the order.)

Order given
out to
solicitor.

The original order is given out to the solicitor, who will make all the necessary arrangements with the examiner appointed by the order.

Examination
how taken.

The evidence is taken in narrative form and then read over to the witness, who should sign it.

Depositions
returned by
examiner.

The depositions with the order of appointment are then returned to the registrar by the examiner with his certificate, and a minute is then drawn up in the registry (as in the case of a "commission") and the depositions and other documents filed.

[*In fact the whole practice after the order is once made is the same as in the case of commissions, as to which, see ante, pp. 610—620. For fees and costs, see ante, pp. 568—603.*]

Evidence,
how taken in
Court in
matrimonial
causes.

By sect. 48 of the Matrimonial Causes Act, 1857, "The rules of evidence observed in the Superior Courts of Common Law at Westminster shall be applicable to and observed in the trial of all questions of fact in the Court."

Attendance
of witnesses,
how com-
pelled.

Sect. 49 provides for enforcing the attendance of witnesses: "The Court may, under its seal, issue writs of subpœna or subpœna *duces tecum*, commanding the attendance of witnesses at such time and place as shall be therein expressed; and such writs may be served in any part of Great Britain or Ireland; and every person served with such writ shall be bound to attend, and to be sworn and

give evidence in obedience thereto, in the same manner as if it had been a writ of subpœna or subpœna *duces tecum* issued from any of the said Superior Courts of Common Law in a cause pending therein, and served in Great Britain or Ireland, as the case may be. . . .”

Examinations.

Evidence, how taken in Court in matrimonial causes.

[*The rest of the section permits a person to affirm instead of swearing; but the whole subject of oaths and affirmations is now regulated by the Oaths Act, 1888 (51 & 52 Vict. c. 46), as to which, see ante, pp. 609, 610.*]

Oaths and affirmations.

And by sect. 50, “All persons wilfully deposing or affirming falsely in any proceeding before the Court shall be deemed to be guilty of perjury, and shall be liable to all the pains and penalties attached thereto.”

Witnesses giving false evidence guilty of perjury.

By rule 109, “Every subpœna shall be written or printed on parchment, and may include the names of any number of witnesses (*but see post, p. 630*). The party issuing the same, or his or her solicitor, shall take it, together with a præcipe, to the registry, and there get it signed and sealed, and there deposit the præcipe.”

SUBPŒNAS.

To be written or printed on parchment.

And by rule 180, “The issuing of fresh subpœnas in each term shall be abolished, and it shall not be necessary to serve more than one subpœna upon any witness.”

Fresh subpœnas need not be issued every term.

FORM 122.

Form of Subpœna ad Testificandum.

Subpœna *ad testificandum*, form of.

GEORGE V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the seas, King, Defender of the Faith.

To [*names of all witnesses included in the subpœna to be inserted*], greeting.

We command you and every of you to be and appear in your proper persons before the Right Honourable Sir

Subpœnas.
Ad testifican-
dum, form of.

Samuel Evans, Knight, the President of the Probate, Divorce, and Admiralty Division of our High Court of Justice at Westminster, in our county of Middlesex, on , the day of , 19 , by half-past ten of the clock in the forenoon of the same day, and so from day to day whenever the said Division of our said Court is sitting, until the cause or proceeding is heard, to testify the truth, according to your knowledge, in a certain cause now in our said Court before our said judge depending between A. B., petitioner, and C. B., respondent, and R. S., co-respondent, on the part of the petitioner (*or* respondent *or* co-respondent, *or as the case may be*), and on the aforesaid day, between the parties aforesaid to be heard. And this you or any of you shall by no means omit, under the penalty of each of you of £100. Witness, the Right Honourable Sir Samuel Evans, Knight, at our High Court of Justice, the day of , 19 , in the year of our reign.

(Signed) X. Y., Registrar.

Subpœna issued by ,
 solicitor for the .

N.B.—Notice will be given to you of the day on which your attendance will be required.

FORM 123.

Præcipe for,
 form of.

Præcipe for Subpœna ad Testificandum.

[*Heading as, e.g., in Form 32, ante, p. 344.*]

Subpœna for (*insert witnesses' names*), to testify between A. B., petitioner, C. B., respondent, and R. S., co-respondent, on the part of the petitioner (*or* respondent *or* co-respondent).

(Signed) $\left\{ \begin{array}{l} \text{A. B.} \\ \text{C. B.} \\ \text{R. S.} \end{array} \right\}$ *or* $\left\{ \begin{array}{l} \text{P. A., petitioner's (or} \\ \text{respondent's or co-respon-} \\ \text{dent's) solicitor.} \end{array} \right\}$

Subpœnas.

FORM 124.

Subpœna Duces Tecum.

Subpœna
duces tecum,
form of.

GEORGE V., by the grace of God of the United Kingdom
of Great Britain and Ireland and of the British
Dominions beyond the seas, King, Defender of the
Faith.

To [*names of all witnesses included in the subpœna
to be inserted*], greeting.

We command you and every of you to be and appear
in your proper persons before the Right Honourable Sir
Samuel Evans, Knight, President of the Probate, Divorce
and Admiralty Division of our High Court of Justice at
Westminster in our county of Middlesex, on , the
day of , 19 , by eleven of the clock in the
forenoon of the same day, and so from day to day when-
ever the said Division of our said Court is sitting until the
cause or proceeding is heard, and also that you bring with
you, and produce at the time and place aforesaid (*here
describe shortly the deeds, letters, papers, &c. required to
be produced*), then and there to testify and show all and
singular those things which you or either of you know, or
the said deed or instrument doth import, of and concerning
a certain cause or proceeding now in the said Court before
our said judge depending between A. B., petitioner, and
C. B., respondent, and R. S., co-respondent, on the part of
the petitioner (*or the respondent or co-respondent, as the
case may be*), and on the aforesaid day between the parties
aforesaid to be heard. And this you or any of you shall
by no means omit under the penalty of each of you of
£100. Witness, the Right Honourable Sir Samuel Evans,
Knight, President of the Probate, Divorce, and Admiralty
Division of our High Court of Justice, the day of
 , 19 , in the year of our reign.

(Signed) X. Y., Registrar.

Subpœnas. Subpœna issued by _____, solicitor for
Duces tecum. the _____.

N.B.—Notice will be given to you of the day on which your attendance will be required.

FORM 125.

Præcipe for,
form of.

Præcipe for Subpœna Duces Tecum.

[*Heading as, e.g., in Form 32, ante, p. 344.*]

Subpœna for _____ to testify and produce, &c., between A. B., petitioner, C. B., respondent, and R. S., co-respondent, on the part of the petitioner (*or* respondent *or* co-respondent).

(Signed) $\left\{ \begin{array}{l} \text{A. B.} \\ \text{C. B.} \\ \text{R. S.} \end{array} \right\}$ *or* $\left\{ \begin{array}{l} \text{P. A., petitioner's} \\ \text{spondent's} \\ \text{co-respondent's} \end{array} \right\}$ solicitor.

How sealed.

Must be filled up, all but names of witnesses, before brought into Divorce Registry for sealing.

Stamp.

Only one præcipe required for several subpœnas. Not more than three witnesses can be included in one subpœna.

Forms can be purchased in registry.

Subpœnas may issue on inquiries as to alimony, maintenance, or variation of settlements.

Subpœnas in matrimonial causes are sealed in the Divorce Registry. The subpœna with a præcipe is brought into the registry by the solicitor, or party in person. The subpœna must be fully filled up, all except the names of the witnesses, before it is brought into the registry. The subpœna is sealed and issued, and the præcipe left with a 5s. stamp. Only one præcipe is required, although several subpœnas may be issued, but the 5s. stamp fee must be paid on each subpœna. Not more than three witnesses can be included in each subpœna.

Forms of subpœna may be purchased at the Divorce Registry (Room 43).

The registrars can direct that witnesses shall be subpœnaed on inquiries as to alimony, maintenance or variation of settlements.

[*For the practice as to particulars, see ante, pp. 361—367.*]

**DISCOVERY,
INSPECTION
AND
INTERRO-
GATORIES.**

The Probate, Divorce, and Admiralty Division has the same powers as to discovery and inspection, including the power of giving leave to administer interrogatories, as the other Divisions of the High Court. (*See on this point, ante, p. 258.*)

General power
of Court to
order.

An application for discovery and inspection, or for leave to administer interrogatories in a matrimonial suit, must be made by summons, and the summons may be issued *though the answer has not been filed*, but as a general rule the order will not be made until after the answer is filed.

Order for,
how obtained.

The order for discovery and inspection, when made, directs, that within days after service, the petitioner do file a full and sufficient affidavit, stating whether he has or has had in his possession or power, and (if any) what documents relating to the matters in question in the cause, and within days after filing such affidavit, produce to the respondent or his solicitor, such documents as are in his possession; and that the respondent or his solicitor may be at liberty to inspect and peruse the documents, and take copies of them. *No affidavit in support of summons is necessary, nor is any deposit money required to be lodged.*

Order for,
contents of.

The list of documents may be included in the affidavit, or may be set out in a schedule separate from the affidavit.

List of
documents
included in
affidavit or
set out in
separate
schedule.

The usual filing fee of 2s. 6d. will be charged for each of these documents, so that it costs twice as much to file an affidavit of documents with a separate schedule, as when the list of documents is included in the affidavit.

Fees for
filing.

FORM 126.

Summons for Discovery and Inspection.

Summons for,
form of.

[*Heading as, e.g., in Form 32, ante, p. 344.*]

Let attend one of the registrars at the registry
of the High Court of Justice at Somerset House, Strand,

**Discovery,
Inspection
and Interro-
gatories.**

Summons for,
form of.

in the county of Middlesex, on next, the day
of , 19 , at of the clock in the noon,
on the hearing of an application on the part of the above-
named , that the above-named do within
days after service of the order to be made hereon upon
h make and file a full and sufficient affidavit stating
whether h h or ha had in h possession or power
and (if any) what document relating to the matters in
question in this , and accounting for the same. And
that h do within days after the filing of such
affidavit produce to the said , h solicitor or agent,
such of the said documents as by such affidavit shall appear
to be in h possession, custody, or power, except such of
the same (if any) as h may by h said affidavit object
to produce. And that the said , h solicitor or
agent, may be at liberty to inspect and peruse the docu-
ments so produced and take copies thereof and abstracts
and extracts therefrom as h shall be advised at h ex-
pense. And that the said may be at liberty to make
such further application as to all or any of the documents
mentioned in the said affidavit as h may be advised.

Dated this day of , 19 .

To .

This summons was issued by W. W., of 66, Frederick's
Place, Old Jewry, E.C., solicitors for .

FORM 127.

Affidavit as to
documents,
form of.

Affidavit as to Documents.

[*Heading as, e.g., in Form 32, ante, p. 344.*]

I, A. B., of , in the county of , the petitioner
in the above cause (*or as the case may be*), make oath and
say:—

1. That I have in my possession or power the documents
set forth in Schedules A. and B. hereto:

Discovery,
Inspection
and Interro-
gatories.

Affidavit of
documents,
form of.

2. That I object to produce the documents set forth in the said Schedule B. on the ground that

[Here set forth fully grounds of objection, such as privilege, &c.]

3. That I have had, but have not now in my possession or power, the documents set forth in Schedule C. hereto, but that I parted with the possession of them on or about

[State when and how the documents were parted with, and what has become of them, to the best of your knowledge and belief.]

4. I have not now and never have had (to the best of my knowledge and belief) in my possession or control, or in the possession or control of my solicitors or agents, or of any other person on my behalf, any deed, agreement, letter, memorandum, or other document, or any copy of or extract from any deed, agreement, letter, memorandum, or other document, or any book containing any copy of or extract from any deed, agreement, letter, memorandum, or other document, or any other paper writing of any sort or description whatsoever, in any way relating to the matters at issue in this cause, other than the documents set forth in the said schedules.

SCHEDULE A.

[Documents referred to in paragraph 1.]

SCHEDULE B.

[Documents referred to in paragraph 2.]

SCHEDULE C.

[Documents referred to in paragraph 3.]

Sworn, &c.

Discovery,
Inspection
and Interro-
gatories.

The practice as to giving *notices to produce and admit documents* is the same in matrimonial as in other actions.

Notice to
produce.

FORM 128.

Notice to
admit
documents,
form of.

Notice to Produce and Admit Documents.

[*Heading as, e.g., in Form 32, ante, p. 344.*]

Take notice that the petitioner (*or as the case may be*) in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the respondent (*or as the case may be*) at , on , between the hours of and , and the respondent (*or as the case may be*) is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed as they purport respectively to have been, that such as are specified to be copies are true copies, and that such documents as are stated to have been served, sent, or delivered were so served, sent, or delivered respectively, saving all just exceptions to the admissibility of all such documents as evidence in the cause.

To { C. B. } or to , solicitor {
 { A. B. } for . }
(Signed) { A. B. } or , solicitor {
 { C. B. } for . }

[*Here describe the documents.*]

No rules and
orders of
Divorce Court
relating to.

As a matter of fact, there are no rules and orders of the Divorce Court relating to discovery and inspection or interrogatories. At all events, none have ever been promulgated, whatever may be the private practice of the Divorce Registry in such matters.

Rules of
Supreme
Court must be
called in aid.

Therefore practitioners must look to the Rules of the Supreme Court to guide them in such matters. (*See Giles v. Giles*, (1900) P. 17; 69 L. J. P. 26; 81 L. T. 823.)

The following is summarized from the Annual Practice, 1913, pp. 473—491.

ORDER XXXI.

By rule 1, in any cause or matter (*parties*), by leave of the Court or a judge, may deliver interrogatories in writing for the examination of the opposite party (*or parties*); such interrogatories are to have a note at the foot stating which interrogatories each person is supposed to answer. Only one set of interrogatories to the same party to be delivered without further order. Any interrogatories not relating to matters in the cause to be deemed irrelevant, though they may be questions which could be properly put in cross-examination.

By rule 2, the proposed interrogatories are to be submitted to the Court or judge (which in a matrimonial cause means the Divorce registrar, subject to appeal to the judge) for approval. *Only such interrogatories are to be admitted as the registrar shall consider necessary for disposing fairly of the cause or matter, or for saving costs.*

By rule 3, costs of improper interrogatories are to be disallowed.

By rule 4, interrogatories are to be more or less in the following form:—

“[*Heading in Cause.*]

“Interrogatories on behalf of the above-named (petitioner, A. B., respondent, C. D., *or* co-respondent, E. F., *or as the case may be*), for the examination of the above-named (respondent, co-respondent, *or* petitioner, *or as the case may be*).

“1. Did not, &c.

“2. Has not, &c.

“(The respondent is required to answer the interrogatories numbered . . .)

“(The co-respondent is required to answer the interrogatories numbered . . .)”

[See Annual Practice, 1913, Part II., App. B., p. 1338.]

Discovery,
Inspection
and Interro-
gatories.

Ord. XXXI.,
short sum-
mary of.

R. 1.

Leave to
administer
interrogatories.

If more than one
person interro-
gated questions
each is to answer
to be marked.

Only one set of
interrogatories
to same party
without further
order.

Questions not
relating to
matter in issue.

R. 2.

Interroga-
tories to be
submitted to
registrar for
approval.

What ques-
tions to be
allowed.

R. 3.

Costs of im-
proper inter-
rogatories
disallowed.

R. 4.

Interroga-
tories, form
of.

**Discovery,
Inspection
and Interro-
gatories.**

Rule 5. No application to matrimonial causes.

By rule 6, objections to answer interrogatories may be taken on the answer.

R. 5.
No application
to matrimonial
causes.

By rule 7, improper interrogatories may be struck out or set aside.

R. 6.
Objection to
answer, when
to be taken.

By rule 8, interrogatories are to be answered within ten days.

R. 7.
Improper
questions to be
struck out.

By rule 9, the answer to interrogatories shall be in the following form:—

R. 8.
Answer to be
within ten days.

“[*Heading in Cause.*]

R. 9.
Answer to
interrogatories,
form of.

“The answer of the above-named (petitioner, A. B., respondent, C. D., co-respondent, E. F., *or as the case may be*) to the interrogatories for his examination by the above-named (petitioner, respondent, *or* co-respondent, *or as the case may be*).

“In answer to the said interrogatories I, the above-named (petitioner, A. B., respondent, C. D., co-respondent, E. F., *or as the case may be*), make oath and say as follows:—”

[*See Annual Practice, 1913, Part II., App. B., p. 1338.*]

R. 10.
Objection to
answer must
be by
summons.

By rule 10, any objection to the sufficiency of the answer must be determined on summons.

R. 11.
Further
answer,
order for.

By rule 11, if answer insufficient, order may be made for further answer.

R. 12.
Discovery and
inspection,
application
for.

By rule 12, any party may apply for discovery and inspection without filing an affidavit, but discovery shall not be ordered when the Court shall be of opinion that it is not necessary either for disposing fairly of the cause or for saving costs.

R. 13.
Affidavit of
documents.

Rule 13 gives the form of affidavit of documents, but the one already given (*ante*, p. 632) will be best for a matrimonial suit.

R. 14.
Order for
production of
documents,
&c.

By rule 14, the Court may order the production of documents by any party in whose possession they are upon oath, &c., &c.

Rules 15 to 20 relate to the production and inspection of documents.

By rule 21, parties failing to answer interrogatories or to comply with an order for discovery or inspection are liable to attachment.

By rule 22, service of order for interrogatories or discovery on the solicitor for a party is sufficient to found a motion for attachment.

And by rule 23, a solicitor who, having been served with such order, refuses or neglects to give notice thereof to his client, is himself rendered liable to attachment.

By rule 24, parties may use the whole or part only of the answers to interrogatories, but the judge may look at all the answers.

Rules 25, 26, 27, and 27a relate to the giving security for costs to the other side by the party seeking discovery.

Rule 28 relates only to actions brought against a sheriff.

By rule 29, this order shall apply to infants and to their guardians *ad litem*.

[The inherent jurisdiction of the Probate, Divorce, and Admiralty Division to try cases *in camerâ* is not confined to that branch of its jurisdiction which it inherits from the Ecclesiastical Courts. Evidence tendered in a suit for dissolution may be heard *in camerâ* when its nature is such that justice cannot be done if it be heard in open Court: *D. v. D.*, *D. v. De G.*, (1903) P. 144; 72 L. J. P. 51; 88 L. T. 573.]

As a matter of practice, matrimonial causes are, with two exceptions, heard in open Court; the exceptions being (1) suits for nullity on the ground of impotence; (2) cases in which an unnatural offence is charged, and which are heard in private, or as it is usually called, *in camerâ*.

**Discovery,
Inspection
and Interro-
gatories.**

Rr. 15 to 20, *ibid.*

R. 21.
Parties failing to comply with order for interrogatories or discovery or inspection liable to attachment.

Rr. 22, 23.
What service sufficient to found motion for attachment. Solicitor refusing or neglecting to give notice of service also liable to attachment.

R. 24.
Use of interrogatories at trial.

Rr. 25 to 27a.
Security for costs.

R. 28.
No application to matrimonial cause.

R. 29.
Ord. XXXI.
Applicable to infants and their guardians.

Hearing evidence in matrimonial cause *in camerâ*.

**ENFORCING
DECREES
AND
ORDERS.**

Enforcing Decrees and Orders.

Mat. C. Act,
1857 (20 & 21
Vict. c. 85),
s. 52.

Decrees and
Orders, how
enforced.

Writ of
attachment,
fi. fa., *elegit*,
sequestration,
committal, and
garnishee
orders.
Receiver.

By sect. 52 of the Matrimonial Causes Act, 1857 (repealed by 55 & 56 Vict. c. 19), it was enacted that "All decrees and orders to be made by the Court in any suit, proceeding, or petition, to be instituted under authority of this Act, shall be enforced and put in execution in the same or the like manner as the judgments, orders, and decrees of the High Court of Chancery may be now enforced and put in execution."

The decrees and orders of the Probate, Divorce and Admiralty Division in matrimonial causes are now enforced by means of writs of attachment for contempt, *fieri facias*, sequestration and *elegit*, and by committal orders; also by means of garnishee orders and the appointment of a receiver.

By rule 117, "When it is necessary to serve personally any order or decree of the Court, the original order or decree, or an office copy thereof, under seal of the Court, must be produced to the party served, and annexed to the affidavit of service marked as an exhibit by the commissioner or other person before whom the affidavit is sworn."

[*Practitioners must be careful to observe this rule, as no decree or order can be enforced that has not been personally served.*]

Writs, how
applied for.

Attachment
by motion.

Writs of
fieri facias,
sequestration
and *elegit* by
application at
registry.

By rule 110, it was ordered that "application for writs of attachment, and also for writs of *fieri facias* and of sequestration, must be made . . . by motion in Court."

But by rules 179 and 203, "An order for payment of costs or any other sum of money payable under an order of the Court is to be served on the solicitor for the party, and if the costs be not paid within the seven days a writ of *fieri facias* or writ of sequestration or writ of *elegit* shall

be issued as of course in the registry, upon an affidavit of service of the order, and non-payment."

**Enforcing
Decrees and
Orders.**

Therefore such writs are no longer applied for by motion, but application for them is made at the registry upon an affidavit of service of the order, and an affidavit of non-payment made by the party to whom the money was ordered to be paid.

There must be an affidavit showing that the conditions of rules 179 and 203 have been complied with.

Service of order must be proved by affidavit.

[*Forms of writs can be purchased at any law stationer's, or at the Divorce Registry, Room 43.*]

The solicitor adds the amount of the costs of and incidental to the issue of the writ to the original debt for which it has issued.

Costs of and incidental to issue of writ to be added to principal debt.

[*For costs and fees, see ante, pp. 540—603.*]

By rule 111, "Such writs when ordered to issue are to be prepared by the party at whose instance the order has been obtained and taken to the registry, with an office copy of the order, and when approved and signed by one of the registrars shall be sealed with the seal of the Court, and it shall not be necessary for the . . . judges of the Court to sign such writs."

Writs to be prepared by party obtaining order.

Applications for a writ of attachment must still be made by motion supported by affidavit of service of the order, *which must have been personal*, and of its not having been complied with. When an order for attachment is made, it generally directs that the writ remain in the registry for a fortnight, and be only then issued on an affidavit showing that the order has not been complied with.

Attachment.
Applications for writ of, must be by motion.

For a garnishee order, or for the appointment of a receiver, application is made by summons, supported by affidavit of service of the order and non-payment, and of particulars as to the debt and property in respect of which the order is asked for.

Garnishee order and receiver.

For committal orders application must be made to the Court of Bankruptcy upon a judgment summons.

Committal order.

**Enforcing
Decrees and
Orders.**

FORM 129.

Writ of
attachment,
form of.

Writ of Attachment.

In the High Court of Justice,
Probate, Divorce, and Admiralty Division.
(Divorce.)

Between A. B., petitioner, and
C. D., respondent.

Or,

A. B. v. C. D.

GEORGE V., by the grace of God of the United Kingdom
of Great Britain and Ireland, and of the British
Dominions beyond the seas, King, Defender of the
Faith.

To the Sheriff of greeting.

We command you to attach C. D. so as to have him
before us in this Division of our High Court of Justice,
there to answer to us as well touching a contempt which
he, it is alleged, hath committed against us, as also such
other matters as shall be then and there laid to his charge,
and, further to perform and abide such order as our said
Court shall make in this behalf, and hereof fail not, and
bring this writ with you.

Witness, the Honourable Sir Samuel Evans, at our
High Court of Justice, the 12th day of March, 1911.

(Signed) R. A. P.,
Registrar.

[The writ should be endorsed as follows:—]

This writ was issued by R. C. T., of 25, Coleman
Street, London, E.C., solicitor for the petitioner, who
resides at .

This writ is issued by order of Court dated January 31st,
1911, whereby the said C. D. was pronounced by the

Court to be contumacious, and in contempt for non-compliance with an order made in this cause on the 19th day of November, 1910, whereby the said respondent was ordered, &c., &c.

Enforcing
Decrees and
Orders.

[A præcipe in Form 133 (1) is filed with a 5s. stamp when this writ is sealed and issued.]

FORM 130.

Writ of Fieri Facias.

Writ of
feri facias,
form of.

[Title and commencement as in Form 129.]

To the sheriff of , greeting:

We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made the sum of £ for (*as the case may be*), in which the said C. D. was lately before us in our High Court of Justice in a certain cause wherein A. B. is the petitioner and C. D. the respondent therein depending, and by an order of our said Court, bearing date the day of , ordered to be paid by the said C. D. to A. B., together with certain costs in the said order mentioned, and which costs have been taxed and allowed by one of the registrars of the Divorce Registry of our said Court at the sum of £ , as appears by the certificate of the said registrar, dated the day of . And that of the goods and chattels of the said C. D. in your bailiwick you further cause to be made the said sum of £ [costs], together with interest thereon at the rate of £4 per centum per annum from the day of , and that you have that money and interest before us in our said Court immediately after the execution hereof to be paid to the said A. B. in pursuance of the said order. And in what manner you shall have executed this our writ make appear to us in our said Court immediately after the execution thereof. And have there then this writ.

Witness, &c.

[A præcipe in Form 133 (2) is filed in the registry with a 5s. stamp, when this writ is sealed and issued.]

Enforcing
Decrees and
Orders.

FORM 131.

Writ of Sequestration.

[*Title and commencement as in Form 129, p. 640.*]

To (*names of not less than four commissioners*)
greeting:

Writ of
sequestration,
form of.

WHEREAS lately in the Probate, Divorce, and Admiralty Division of our High Court of Justice in a certain cause there depending, wherein A. B. is petitioner and C. D. is respondent, by an order of our said Court made in the said cause, and bearing date the day of , 19 , it was ordered that the said C. D. should pay into Court to the credit of the said cause the sum of £ : Know ye, therefore, that we, in confidence of your prudence and fidelity, have given, and by these presents do give to you, or any three or two of you, full power and authority to enter upon all the messuages, lands, tenements, and real estate whatsoever of the said C. D., and to collect, receive, and sequester into your hands not only all the rents and profits of his said messuages, lands, tenements, and real estate, but also all his goods, chattels, and personal estates whatsoever; and therefore we command you, any three or two of you, that you do at certain proper and convenient days and hours, go to and enter upon all the messuages, lands, tenements, and real estates of the said C. D., and that you do collect, take, and get into your hands not only the rents and profits of his said real estate, but also all his goods, chattels, and personal estate, and detain and keep the same under sequestration in your hands until the said C. D. shall [pay into Court to the credit of the said cause the sum of £] clear his contempt, and our said Court make other order to the contrary.

Witness, &c.

[*A præcipe in Form 133 (3) is filed in the registry, with a 5s. stamp, when this writ is sealed and issued.*]

FORM 132.

Enforcing
Decrees and
Orders.

Writ of Elegit.

[*Title and commencement as in Form 129, p. 640.*]

To the sheriff of greeting:

WHEREAS lately in the Probate, Divorce, and Admiralty Division of our High Court of Justice in a certain cause there depending, wherein A. B. is petitioner and C. D. respondent, by an order of our said Court made in the said cause and bearing date the day of , it was ordered that A. B. should pay unto C. D. the sum of £ , together also with certain costs as in the said order mentioned, and which costs have been taxed and allowed by , one of the registrars of our said Court, at the sum of £ as appears by the certificate of the said registrar, dated the day of . And afterwards the said C. D. came into our said Court, and according to the statute in such case made and provided, chose to be delivered to her all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick as the said A. B., or any one in trust for him, was seised or possessed of on the day of in the year of our Lord (*insert date of order*), or at any time afterwards, or over which the said A. B., on the said day of or at any time afterwards, had any disposing power which he might without the assent of any other person exercise for his own benefit, to hold to him the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £ and £ together with interest upon the said sums at the rate of £4 per centum per annum from the said day of shall have been levied. Therefore we command you that without delay you cause to be delivered to the said C. D. by a reasonable price and extent all such lands and tenements, rectories, tithes, rents

Writ of elegit,
form of.

**Enforcing
Decrees and
Orders.**

Writ of elegit,
form of.

and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick as the said A. B., or any person or persons in trust for him, was or were seised or possessed of on the said day of , or at any time afterwards, or over which the said A. B. on the said day of , or at any time afterwards, had any disposing power which he might without the assent of any other person exercise for his own benefit, to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns until the said two several sums, and interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ make appear to us in our Court aforesaid, immediately after the execution thereof, under your seals, and the seals of those by whose oath you shall make the said extent and appraisement. And have there then this writ.

Witness, &c.

[A præcipe in Form 133 (4) is filed in the registry with a 5s. stamp, when this writ is sealed and issued.]

FORM 133.

Præcipes,
forms of.

Forms of Præcipes for Writs of Attachment, Fieri Facias, Sequestration and Elegit.

(1) ATTACHMENT.

[Title as in Form 129.]

Attachment.

Seal in pursuance of order dated day of , an attachment directed to the sheriff of , against C. D. for not delivering to A. B.

(2) FIERI FACIAS.

[Title as in Form 129.]

Fieri facias.

Seal a writ of *fieri facias* directed to the sheriff of , against C. D., of , in the county of , upon a judgment (or order) dated the day of for the sum of £ debt and £ costs and interest, &c.

Indorsed to levy £ and interest thereon at £4
per centum per annum from the (*date*) and costs of Enforcing
execution. Decrees and Orders.

Enforcing Decrees and Orders.

X. Y., solicitor for (*party on whose behalf writ is to issue*).

(3) SEQUESTRATION.

[*Title as in Form 129.*]

Seal a writ of sequestration against C. D. for not Sequestra-
at the suit of A. B. directed to order dated tion.
the day of , 19 .

Sequestra- tion.

(4) ELEGIT.

[Title as in Form 129.]

Seal a writ of elegit directed to the sheriff of _____, Elegit.
against _____ of _____, in the county of _____, for not
paying to A. B. the sum of £ _____, together with interest
thereon, from the _____ day of _____ (and the sum of
£ _____ for costs), with interest thereon at the rate of
£4 per centum per annum.

Elegit.

Judgment (*or* order) dated day of , 19 .
(Taxing officer's certificate, dated day of ,
19 .)

X. Y., solicitor for .

[All the above Forms have been adapted from the Annual Practice, 1913.]

As has been seen, by sect. 52 of the Matrimonial Causes Act, 1857 (repealed by 55 & 56 Vict. c. 19), decrees and orders were to be enforced in the same manner as the decrees and orders of the Court of Chancery were enforced in 1857.

In "Daniell's Chancery Practice," 4th ed., p. 938, it is stated that in 1857 an order of the Court of Chancery had to be endorsed in the following manner:—"If you, the within-named A. B., neglect to obey this decree (or order) by the time therein limited, you will be liable to be

Practice of
Court of
Chancery
in 1857.

Practice of
Court of
Chancery
in 1857.

Enforcing
Decrees and
Orders.

Ibid.

Chancery
Division at
present day.

arrested, under a writ of attachment issued out of the High Court of Chancery, or by the serjeant-at-arms attending the same Court; and also be liable to have your estate sequestered, for the purpose of compelling you to obey the same decree (or order).” Since the passing of the Judicature Acts, the form of orders made in the Chancery Division is regulated by Ord. XLI., rule 5, which is in the following terms:—“Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment or order within which the act is to be done, and upon the copy of the judgment or order which shall be served upon the person required to obey the same there shall be endorsed a memorandum in the words or to the effect, following: ‘If you, the within-named A. B., neglect to obey this judgment (or order) by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment (or order).’”

[Before applying for attachment, it must be shown that the order was endorsed as above: *Pace v. Pace* (1891), 61 L. J. P. 114; 67 L. T. 383.]

Personal service of order necessary before motion for attachment.
The Court no longer orders attachment to issue for non-payment of a sum of money.

By rule 179 of the Divorce Court rules personal service is required of every order which it is desired to enforce by attachment.

[The powers of the Court to attach for non-payment of a sum of money by the Bankruptcy Acts, 1869 and 1883, the remedies now are by writ of *fi. fa.*, sequestration or *elegit*, or by a garnishee order and appointment of a receiver, or by applying to the Bankruptcy Court for a committal order: see *Lynch v. Lynch* (1885), 10 P. D. 183; 54 L. J. P. 93; *De Lossy v. De Lossy* (1890), 15 P. D. 115; 62 L. T. 704.

Failure to give security, attachment for.

But the Court will attach a husband for disobedience to so much of the order as orders him to give security for his wife’s costs; that is, if she can show he is able to do so and the rest of the circumstances warrant it: see *Lynch v. Lynch*, *supra*; *Bates v. Bates* (1889), 14 P. D. 17; 58 L. J. P. 85; 60 L. T. 125; *Shine v. Shine*, (1893) P. 289; 63 L. J. P.

60; 69 L. T. 500; but see *Sullivan v. Sullivan, Leahay, Madden and Slaney* (1875), 33 L. T. 706; *Clarke v. Clarke*, (1891) P. 278; 60 L. J. P. 97.

Enforcing
Decrees and
Orders.

Issuing advertisements by party to suit to obtain evidence against the other party may be punished by attachment: *Butler v. Butler* (1888), 13 P. D. 73; 57 L. J. P. 42; 58 L. T. 563; and see *Brodribb v. Brodribb and Wall* (1886), 11 P. D. 66; 55 L. J. P. 47; 56 L. T. 672.

Advertise-
ments for
evidence by
party to suit.

Since the passing of the Matrimonial Causes Act, 1884, the Court no longer attaches for disobedience to order to return to cohabitation: *Weldon v. Weldon* (1885), 54 L. J. P. 60; 52 L. T. 233.

Restitution
of conjugal
rights.

For cases where attachment refused against a party for molesting the other party, see *Smith v. Smith* (1889), 59 L. J. P. 15; *Northledge v. Northledge* (1894), 70 L. T. 815.

Molestation.

Where a wife disobeyed an order that a child should be given up to the husband "*forthwith*," and removed the child out of the jurisdiction, the Court made an order for her attachment and committal: *Gordon v. Gordon and Granville Gordon*, (1903) P. 141; 72 L. J. P. 33; 89 L. T. 73.]

Attachment
ex parte;
wife disobey-
ing order not
to take child
out of juris-
diction.

Motions for attachment must always be made before a judge. In vacation they are made before the vacation judge, though he is not one of the judges of the Division.

As stated *ante*, p. 639, the usual practice is to order that the writ lie in the registry for one fortnight, to give the party a further opportunity of complying with the order.

The writ is not issued until an affidavit of search has been filed, showing that the order has not been complied with.

Motion for
must always
be before
judge; in
vacation
before vaca-
tion judge.
Further time
given for
compliance
before issue
of writ.

And by rule 112, "Any person in custody under a writ of attachment may apply for his or her discharge to the judge, if the Court be then sitting; if not, then to one of the registrars, who for good cause shown shall have power to order such discharge."

Affidavit of
search, show-
ing order not
complied
with, must be
filed before
issue of writ.
Person in
custody
under, dis-
charge of.

[Husband in custody under attachment is entitled to release on compliance with the order. Although the Court will order him to pay all his wife's costs incurred in connection with the attachment, it will not make the payment of such costs a condition precedent of his release: *Ayres v. Ayres* (1902), 71 L. J. P. 18; 25 L. T. 648.]

Payment of
wife's costs
not condition
precedent to
discharge.

Enforcing Decrees and Orders.

Before granting discharge Court must be satisfied that order complied with.

Sequestration. Pension of officer ;

pay of officer. Civil Service pension.

Rent-charge.

Ibid. order for, without service of original order.

Writ of elegit against husband by wife who had obtained mandamus against her ordering her to give up certain deeds.

Sequestration against trustees.

Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 103.

Power to Lord Chancellor to transfer jurisdiction under Debtors Act, 1869, to bankruptcy judge and registrars.

Power to vary orders so made.

The Court must be satisfied by affidavit that the order has been complied with, and when the order of discharge has been obtained the prisoner will not be released until the sheriff's certificate has been obtained that there are no other detainers against him.

[Pension of officer in Indian Army (*Birch v. Birch* (1883), 8 P. D. 163; 52 L. J. P. 88); and pay of Navy surgeon on active service (*Apthorpe v. Apthorpe* (1887), 12 P. D. 192; 57 L. T. 518), not liable to sequestration.

Court ordered sequestrators to receive portions of Civil Service pension: *Sansom v. Sansom* (1879), 4 P. D. 69; 48 L. J. P. 25; 39 L. T. 642. Sequestration ordered in general terms where only property a rent-charge, of which trustees had discretion to refuse payment: *Clinton v. Clinton* (1866), L. R., 1 P. & D. 215; 14 L. T. 257. Sequestration ordered without service of original order against property of wife refusing to obey order to give up children: *Hyde v. Hyde* (1888), 13 P. D. 166; 57 L. J. P. 89; 59 L. T. 529. Wife obtained writ of elegit against her husband, who had failed to comply with order to pay her costs. He obtained a mandamus ordering her to deliver up certain deeds. The Court refused to set aside the writ of elegit, notwithstanding the mandamus: *Kippax v. Kippax* (1891), 67 L. T. 382.

The Court has no power to enforce a writ of sequestration against property in the hands of trustees, unless they appear and submit to the jurisdiction: *Craig v. Craig and Hamp*, (1896) P. 171; 65 L. J. P. 99; 75 L. T. 280.]

The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 103, with respect to the jurisdiction formerly exercised by the Probate Division in common with the other Divisions of the High Court, enacts as follows:—

“(1.) It shall be lawful for the Lord Chancellor by order to direct that the jurisdiction and powers under section five of the Debtors Act, 1869, now vested in the High Court, shall be assigned to and exercised by the judge to whom bankruptcy business is assigned.

“(2.) It shall be lawful also for the Lord Chancellor in like manner to direct that the whole or any part of the said jurisdiction and powers shall be delegated to and exercised by the bankruptcy registrars of the High Court.

“(3.) Any order made under this section may, at any time, in like manner, be rescinded or varied.

Enforcing
Decrees and
Orders.

“(4.) Every county court within the jurisdiction of which a judgment debtor is or resides shall have jurisdiction under section five of the Debtors Act, 1869, although the amount of the judgment debt may exceed fifty pounds (now £100).

Jurisdiction
of County
Court.

“(5.) Where, under section five of the Debtors Act, 1869, application is made by a judgment creditor to a court having bankruptcy jurisdiction, for the committal of a judgment debtor, the court may, if it thinks fit, decline to commit, and in lieu thereof, with the consent of the judgment creditor, and on payment by him of the prescribed fee, make a receiving order against the debtor. In such case the judgment debtor shall be deemed to have committed an act of bankruptcy at the time the order is made.

Committal
orders, how
applied for.

“(6.) General rules under this Act may be made for the purpose of carrying into effect the provisions of the Debtors Act, 1869.”

And by rule 265 of the General Rules made under the said Act, it is further provided:—

“Unless and until the Lord Chancellor otherwise orders, the jurisdiction and powers of the High Court under sect. 5 of the Debtors Act, 1869, shall be exercised by the bankruptcy registrars of the High Court.”

Applications for orders for committal for non-payment of a sum of money for alimony or costs (*or as the case may be*), payable under an order of the Court made in a matrimonial cause, must be by summons to the proper Bankruptcy Court.

The practice is entirely regulated by the practice of the Bankruptcy Court.

In Bank-
ruptcy
Court only ;

The order for committal will not be made without proof of means, or without proof that the original order has been personally served on the person it proposed to commit.

but must be
proof of
means, and
original order
must be served
personally.

**Enforcing
Decrees and
Orders.**

Receiver.
Application
for, Ord. L.
r. 15a,
R. S. C.
Judge to con-
sider amount
of debt, &c.
May direct
inquiries.

Application
for, by sum-
mons before
judge.

Ord. L.
r. 16, R. S. C.
to give
security to
satisfaction
of Court.

Power to
order salary
for.

By Ord. L. r. 15a, R. S. C., in every case in which an application is made for the appointment of a receiver, the judge, in determining whether it is just or convenient that such appointment should be made, shall have regard to the amount of the debt claimed by the applicant, to the amount which may probably be obtained by the receiver and to the probable costs of his appointment, and may, if he shall think fit, direct any inquiries on these or other matters before making the appointment.

[The application for a receiver is made in matrimonial causes before a judge in chambers.]

By rule 16, where an order is made directing a receiver to be appointed, unless otherwise ordered, the person to be appointed shall first give security, to be allowed by the judge (*in matrimonial causes the registrar decides the amount of security, subject to appeal to the judge*), and taken before a person authorized to administer oaths, duly to account for what he shall receive as such receiver, and to pay the same as the judge shall direct; and the person so to be appointed shall, unless otherwise ordered, be allowed a proper salary or allowance.

The following (suggested) form of bond is adapted from Appendix L, No. 21 (*Annual Practice*, 1913, *Part II.*, p. 1500):—

FORM 134.

Receiver's
bond, form of.

Receiver's Bond.

Know all men by these presents that I, A. B., and we, C. D. and E. F., are jointly and severally held and firmly bound unto G. H., of _____, in the county of _____, in the sum of £ _____ of lawful money of the United Kingdom of Great Britain and Ireland, to be paid unto the said G. H. or his executors or administrators, for which payment, well and truly to be made, I, the said A. B., for myself, my heirs, executors and administrators, and every of them, and we, the said C. D. and E. F., for ourselves,

our heirs, executors and administrators, do bind and oblige ourselves for the whole firmly by these presents.

Sealed with our seals on the 7th day of August, 1911.

Whereas by an order of the Probate, Divorce, and Admiralty Division of the High Court of Justice, made on the 7th day of July, 1911, in a suit in which I. J. is petitioner and K. J. is respondent, it was ordered that upon the above bounden A. B. first giving security to the satisfaction of one of the registrars of the Divorce Registry of the said Division, he should be appointed receiver of the rents and profits of the real estate, and to collect and get in the outstanding personal estate of the said I. J. in the *said* order named; and that such receiver should, at such time or times as might be ordered by one of the said registrars, file and pass his accounts, and should from time to time, as might be thereafter ordered by one of the said registrars, pay the balance or balances appearing due on the accounts, or such part thereof as should be certified as proper to be so paid in or towards satisfaction of what should, for the time being, be due in respect of the order made on the 6th day of June, 1911, for the sum of £ and £ for costs, making together the sum of £ .

And it was further ordered that the costs of the said order and of carrying out the same, and of obtaining the discharge of the receiver (such costs to be ascertained by one of the said registrars), should be primarily payable out of the sums received by the said receiver; and it was further ordered that the said receiver should duly pay the balance (if any) into Court to the credit of the said suit, or dispose of the same in such other manner as the Court should hereafter direct.

And whereas one of the said registrars of the said Divorce Registry has approved of the said C. D. and E. F. as sureties for the said A. B., and has also approved of the above bond as a proper security to be entered into by the said A. B.

Enforcing
Decrees and
Orders.

Receiver's
bond, form of.

Enforcing
Decrees and
Orders.

Receiver's
bond, form of.

Now the condition of the above-written bond or obligation is that if the above bounden A. B., his executors and administrators, or some or one of them, do and shall duly account for all and every the sum and sums of money which the said A. B. shall so receive on account of the rents and profits of the real estate, and in respect of the personal estate of the said I. J., and dispose of the same in such manner as is hereinbefore set forth, then the above-written bond or obligation shall be void and of no effect; otherwise the same shall be and remain in full force and virtue.

PROVIDED ALWAYS, and it is hereby agreed between the said A. B. and the said C. D. and E. F., that the said A. B., on being discharged from his office of, or ceasing to act as, such receiver as aforesaid, shall forthwith give notice thereof in writing to the said C. D. and E. F., and furnish to them free of charge an office copy of the order of the Court discharging him from the office.

And further, that the said A. B., his heirs, executors and administrators, shall and will from time to time and at all times save, defend, and hold harmless the said C. D. and E. F., their heirs, executors and administrators, from and against all loss and damage, costs and expenses, which he or they shall or may at any time sustain or be put unto by reason or in consequence of the said A. B. having entered into the above-written bond or obligation.

(Signed) A. B.
C. D.
E. F.

[Although the above form is a suggestion, as a matter of practice solicitors will find it best to draft their bond by filling up the blanks in the printed forms of bond which can be purchased at the Royal Courts of Justice.]

Bond to be
drafted by
solicitor
obtaining
order.

The solicitor obtaining the order will draft the bond, and submit it for approval to the opposite party. If approved it can be executed.

It is then taken to the registrar, who, if he approves it, will sign his name to it in the margin.

**Enforcing
Decrees and
Orders.**

[*If the bond or sureties be disapproved of, the same practice must be followed as in the case of a bond for securing the wife's costs, as to which, see ante, pp. 553—558.*]

Signed by registrar.
Bond disapproved by opposite party.
Receiver's accounts.

Ord. L. rr. 18 to 21 inclusive, regulates the investigation of the receiver's accounts. In matrimonial causes such accounts are investigated in the Divorce Registry, but the practice is, as far as possible, the same.

Application is made by summons for the discharge of a receiver.

Ibid. discharge of.

[*For fees and costs, see ante, pp. 540—603.*]

Where a co-respondent who had undertaken to pay costs in instalments died intestate, the Court, having restrained his widow by injunction from dealing with the estate, appointed the petitioner receiver, but ordered the order not to be drawn up for a week, to give the widow an opportunity of deciding whether she would take out administration and give security for the debt: *Waddell v. Waddell and Craig*, (1892) P. 226; 61 L. J. P. 110; 67 L. T. 389.

Co-respondent condemned in costs dying intestate, petitioner appointed receiver.

It appears to have been first held that the Divorce Court had power to attach a debt in the hands of a third person, under the Judicature Act, 1873, s. 25, sub-s. 8, in 1882.

Garnishee order.
Power of Court to order.

[See *Whittaker v. Whittaker* (1881), 7 P. D. 15; 51 L. J. P. 80; 47 L. T. 131.]

Applications for garnishee orders have, however, since become common, and, as there are no rules or orders of the Divorce Court regulating such applications, the practice is under Ord. XLV. r. 9 of Ord. XLVIII. R. S. C.

No rules or orders of Divorce Court relating to Ord. XLV. R. S. C., Ord. XLVIII. R. S. C.

[See *Annual Practice*, 1913, pp. 750—769 and pp. 787—807.]

The garnishee order made in the Divorce Division is an order *nisi*, and the application is made *ex parte*, and must be founded on affidavit.

Garnishee order *nisi*.

**Enforcing
Decrees and
Orders.**

Affidavit in
support of
application
for, contents
of.

Such affidavit should state (1) the date of the order it is desired to enforce, and whether made for alimony or costs, or as the case may be, and the amount; (2) that the order still remains unsatisfied either wholly or partially, and to what amount; (3) that some person, whose name and full description must be given, is indebted to the judgment debtor, and the amount of such indebtedness or thereabouts; and (4) that the garnishee is within the jurisdiction of the Court.

[*For form, see Appendix B., R. S. C., No. 25, Annual Practice, 1913, Part II., p. 1351.*]

Forms of
affidavit and
order *nisi* can
be purchased,
Divorce
Registry,
Room 43.

Garnishee
affidavit and
order *nisi* to
be taken to
registry.

If order *nisi*
granted, time
fixed therein
for showing
cause.

Order *nisi*
entered on
minutes;
affidavit filed.

Service of, on
garnishee.

Showing
cause against.

Ord. XLV.
r. 4, R. S. C.
Garnishee
disputing
liability.

The forms of affidavits and order *nisi* can be purchased in the registry (Room 43), and when completed the affidavits and two copies of the order *nisi* must be taken to the registrar. If the registrar is satisfied with them and also that the judgment debtor has been duly applied to for the debt, he will grant the order *nisi* attaching the debt and further order that the garnishee attend on a certain day.

The order *nisi* is then taken to the registry, entered on the minutes and delivered to the solicitor. The usual fee of 2s. 6d. is paid for filing the affidavit, and 5s. for the order *nisi*, and a deposit of 5s. is made for the order absolute.

The garnishee must be served with a plain copy of the order, but the judgment debtor need not be served at all.

The garnishee can attend and show cause on the day appointed. If he fails to show sufficient cause the order is made absolute.

By Ord. XLV. rule 4, "If the garnishee disputes his liability, the Court or Judge instead of making an order that execution shall issue, may order that any issue or question necessary for determining his liability be tried or determined in any manner in which any issue or question in an action may be tried or determined, or may

refer the matter to a Master," which in the case of a matrimonial cause would mean one of the registrars.

Enforcing
Decrees and
Orders.

[It must be assumed, therefore, that when the garnishee disputes his liability the matter is, or should be, referred in the first instance to the judge.]

If the garnishee fails to attend on the day and hour fixed in the decree *nisi*, the order will not be made absolute without an affidavit of service of the decree *nisi* upon him. When the order is made absolute a further fee of 5s. is payable, the amount of which was deposited at the time of making the order *nisi*.

Garnishee
failing to
appear to
show cause;
affidavit of
service;
order
absolute.

[For costs, see ante, pp. 568—603.]

The practice as to charging orders in the High Court is regulated by Ord. XLVI., R. S. C. (*Annual Practice*, 1913, pp. 769—783).

Charging
order, prac-
tice as to.

A charging order is an order charging stocks or shares.

Meaning of
term.

In matrimonial causes a charging order *nisi* is applied for by summons in the same way as a garnishee order.

Application
by summons.

By Ord. XLVI. r. 4, the affidavit in support of the summons should be in the form given in Appendix B., R. S. C., Form 27 (*Annual Practice*, 1913, Part II., p. 1351).

Affidavit in
support,
form of.

As in the case of a garnishee order, the registrar in the charging order *nisi* fixes the day and hour on which cause shall be shown against it. But in the case of charging order cause is shown before a judge by whom only it can be made absolute.

Appointment
to show cause
against.
Showing
cause against
must be before
judge.

The order *nisi* is served on the bank or company in whose books the stock stands which it is desired to charge, and also on the judgment debtor.

Service of
order.

The practice as to affidavit of service, when the parties served with the order *nisi* do not appear at the time appointed, is the same as in the case of a garnishee order (*ante*, pp. 653, 654).

Party not
appearing to
show cause,
affidavit of
service.

**Enforcing
Decrees and
Orders.**

Discharging
order, how
made,
service of.

Application for a discharging order must be made on summons. When granted, a sealed copy of such discharging order must be served on the bank or company in which the stock stands.

[*For fees and costs, see ante, pp. 540—603.*]

Bankers'
Evidence Act,
1879, s. 7.

Order to
inspect
bankers'
books.

By sect. 7 of the Bankers' Evidence Act, 1879 (42 & 43 Vict. c. 11), "On the application of any party to a legal proceeding, a court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the court or a judge otherwise directs."

Ibid. order
made on
summons.

This order is made on a summons before the judge to show cause why the party should not be allowed to inspect and take copies, &c., following the wording of the section. It may be, of course, very useful to a party desiring to apply for a charging order.

Service of
summons.

The summons is served on the opposite party or his or her solicitor, and not on the bank.

Ibid. order.

The order, when made, is served on the bank.

Enforcing
order for
costs, after
nearly ten
years.

[Where a decree was pronounced, with costs against the co-respondent, but no steps were taken to enforce the order for nearly ten years, the Divorce Court rules being silent as to what is to be done in such a case: held, that the proper course was to apply to the Court under Ord. XLII. r. 23, for an order for the co-respondent to pay the taxed costs, and for leave to issue execution: *Goodwin v. Goodwin and Arnold*, (1897) P. 87; 66 L. J. P. 107.]

No power to
enforce bond
for wife's
costs against
husband in
suits for
judicial
separation.

Where a petition for judicial separation by a wife had been dismissed with costs, the Court of Appeal held that her solicitor could not enforce against the husband the bond executed by him (see *ante*, p. 553) as security for his wife's costs: *Russell v. Russell*, (1892) P. 152; 61 L. J. P. 45; 66 L. T. 436.]

APPENDIX A.



RULES AND REGULATIONS

MADE UNDER THE PROVISIONS OF 20 & 21 VICT. CAP. 85;
23 & 24 VICT. CAP. 144; 32 & 33 VICT. CAP. 62; 38 & 39 VICT. CAP. 77.

RULES AND REGULATIONS, 26TH DECEMBER, 1865.

ALL rules and regulations heretofore made and issued for her Majesty's Court for Divorce and Matrimonial Causes shall be revoked on and after the 11th day of January, 1866, except so far as concerns any matters or things done in accordance with them prior to the said day.

The following rules and regulations shall take effect in her Majesty's Court for Divorce and Matrimonial Causes on and after the 11th day of January, 1866.

Petition.

1. Proceedings before the Court for Divorce and Matrimonial Causes shall be commenced by filing a petition.

2. Every petition shall be accompanied by an affidavit made by the petitioner, verifying the facts of which he or she has personal cognizance, and deposing as to belief in the truth of the other facts alleged in the petition, and such affidavits shall be filed with the petition.

See also Rule 175.

3. In cases where the petitioner is seeking a decree of nullity of marriage, or of judicial separation, or of dissolution of marriage, or a decree in a suit of jactitation of marriage, the petitioner's affidavit, filed with his or her petition, shall further state that no collusion or connivance exists between the petitioner and the other party to the marriage or alleged marriage.

Co-respondents.

4. Upon a husband filing a petition for dissolution of marriage on the ground of adultery, the alleged adulterers shall be made co-respondents in the cause, unless the Judge Ordinary (*a*) shall otherwise direct.

5. Application for such direction is to be made to the Judge Ordinary on motion founded on affidavit.

6. If the names of the alleged adulterers or either of them should be unknown to the petitioner at the time of filing his petition, the same must be supplied as soon as known, and application must be made forthwith to one of the registrars to amend the petition by inserting such name therein, and the registrar to whom the application is made shall give his directions as to such amendment, and such further directions as he may think fit as to service of the amended petition.

7. The term "respondent" where the same is herein-after used shall include all co-respondents so far as the same is applicable to them.

Citation.

8. Every petitioner who files a petition and affidavit shall forthwith extract a citation, under seal of the Court, for service on each respondent in the cause.

9. Every citation shall be written or printed on parchment, and the party extracting the same, or his or her proctor, solicitor, or attorney, shall take it, together with a præcipe, to the registry, and there deposit the præcipe and get the citation signed and sealed.—A Form of Præcipe is given in the Appendix, No. 3 (see p. 305). The address given in the præcipe must be within three miles of the General Post Office.

Service.

10. Citations are to be served personally when that can be done.

11. Service of a citation shall be effected by personally delivering a true copy of the citation to the party cited, and producing the original, if required.

12. To every person served with a citation shall be delivered, together with the copy of the citation, a certified copy of the petition, under seal of the Court.

(*a*) The term "Judge Ordinary" is preserved in the rules, but it should now be read "one of the judges of the Probate, Divorce, and Admiralty Division."

13. In cases where personal service cannot be effected, application may be made by motion to the Judge Ordinary, or to the registrars in his absence, to substitute some other mode of service.

14. After service has been effected, the citation, with a certificate of service endorsed thereon, shall be forthwith returned into and filed in the registry.

15. When it is ordered that a citation shall be advertised, the newspapers containing the advertisements are to be filed in the registry with the citation.

16. The above rules, so far as they relate to the service of citations, are to apply to the service of all other instruments requiring personal service.

17. Before a petitioner can proceed, after having extracted a citation, an appearance must have been entered by or on behalf of the respondents, or it must be shown by affidavit, filed in the registry, that they have been duly cited, and have not appeared.

18. An affidavit of service of a citation must be substantially in the form given in Appendix A (see p. 307), and the citation referred to in the affidavit must be annexed to such affidavit, and marked by the person before whom the same is sworn.

Appearance.

19. All appearances to citations are to be entered in the registry in a book provided for that purpose.

20. An appearance may be entered at any time before a proceeding has been taken in default, or afterwards, as hereinafter directed, or by leave of the Judge Ordinary, or of the registrars in his absence, to be applied for by motion founded on affidavit.

See also Rule 185.

21. Every entry of an appearance shall be accompanied by an address, within three miles of the General Post Office.

22. If a party cited wishes to raise any question as to the jurisdiction of the Court, he or she must enter an appearance under protest, and within eight days file in the registry his or her act on petition in extension of such protest, and on the same day deliver a copy thereof to the petitioner. After the entry of an absolute appearance to the citation a party cited cannot raise any objection as to jurisdiction.

See Rules from 56 to 61 as to proceedings on act on petition.

Interveners.

23. Application for leave to intervene in any cause must be made to the Judge Ordinary by motion, supported by affidavit.

24. Every party intervening must join in the proceedings at the stage in which he finds them, unless it is otherwise ordered by the Judge Ordinary.

Suits in formâ Pauperis.

25. Any person desirous of prosecuting a suit in formâ pauperis is to lay a case before counsel, and obtain an opinion that he or she has reasonable grounds for proceeding.

26. No person shall be admitted to prosecute a suit in formâ pauperis without the order of the Judge Ordinary; and to obtain such order the case laid before counsel and his opinion thereon, with an affidavit of the party or of his or her proctor, solicitor, or attorney, that the said case contains a full and true statement of all the material facts, to the best of his or her knowledge and belief, and an affidavit of the party applying as to his or her income or means of living, and that he or she is not worth £25, after payment of his or her just debts, save and except his or her wearing apparel, shall be produced at the time such application is made.

See also Rules 208 to 211.

27. Where a husband admitted to sue as a pauper neglects to proceed in a cause, he may be called upon by summons to show cause why he should not pay costs, though he has not been dispaupered, and why all further proceedings should not be stayed until such costs be paid.

Answer.

28. Each respondent who has entered an appearance may within twenty-one days after service of citation on him or her file in the registry an answer to the petition.

See also Rule 186.

29. Each respondent shall on the day he or she files an answer, deliver a copy thereof to the petitioner, or to his or her proctor, solicitor, or attorney.

30. Every answer which contains matter other than a simple denial of the facts stated in the petition, shall be accompanied by an affidavit made by the respondent, verifying such other or additional matter, so far as he or she has personal cognizance

thereof and deposing as to his or her belief in the truth of the rest of such other or additional matter, and such affidavit shall be filed with the answer.

31. In cases involving a decree of nullity of marriage or of judicial separation, or of dissolution of marriage, or a decree in a suit of jactitation of marriage, the respondent who is husband or wife of the petitioner shall, in the affidavit filed with the answer, further state that there is not any collusion or connivance between the deponent and the petitioner.

Further Pleadings.

32. Within fourteen days from the filing and delivery of the answer the petitioner may file a reply thereto, and the same period shall be allowed for filing any further pleading by way of rejoinder, or any subsequent pleading.

33. A copy of every reply and subsequent pleading shall on the day the same is filed be delivered to the opposite parties, or to their proctor, solicitor, or attorney.

General Rules as to Pleadings.

34. Either party desiring to alter or amend any pleading must apply by motion to the Court for permission to do so, unless the alteration or amendment be merely verbal, or in the nature of a clerical error, in which case it may be made by order of the Judge Ordinary, or one of the registrars in his absence, obtained on summons.

See also Rules 181 to 184 and Rule 187.

35. When a petition, answer, or other pleading has been ordered to be altered or amended, the time for filing and delivering a copy of the next pleading shall be reckoned from the time of the order having been complied with.

36. A copy of every pleading showing the alterations and amendments made therein shall be delivered to the opposite parties on the day such alterations and amendments are made in the pleadings filed in the registry; and the opposite parties, if they have already pleaded in answer thereto, shall be at liberty to amend such answer within four days, or such further time as may be allowed for the purpose.

37. If either party in the cause fail to file or deliver a copy of the answer, reply, or other pleading, or to alter or amend the same, or to deliver a copy of any altered or amended pleading, within the time allowed for the purpose, the party to whom the copy of such answer, reply, or other pleading, or altered or

amended pleading, ought to have been delivered, shall not be bound to receive it, and such answer, reply, or other pleading shall not be filed, or be treated or considered as having been filed, or be altered or amended, unless by order of the Judge Ordinary, or of one of the registrars, to be obtained on summons. The expense of obtaining such order shall fall on the party applying for it, unless the Judge Ordinary or registrar shall otherwise direct.

38. Applications for further particulars of matters pleaded are to be made to the Judge Ordinary, or to one of the registrars in his absence, by summons, and not by motion.

See also Rules 181 to 184.

Service of Pleadings, &c.

39. It shall be sufficient to leave all pleadings and other instruments, personal service of which is not expressly required by these rules and regulations, at the respective addresses furnished by or on behalf of the several parties to the cause.

See also Rule 114.

Mode of Trial.

40. When the pleadings on being concluded have raised any questions of fact, the petitioner, within fourteen days from the filing of the last pleading, or at the expiration of that time, on the next day appointed for hearing motions in this Court, or in case the petitioner should fail to do so at such time, either of the respondents on whose behalf such questions have been raised, may apply to the Judge Ordinary by motion to direct the truth of such questions of fact to be tried by a special or common jury.

See also Rule 205.

Questions of Fact for the Jury.

41. Whenever the Judge Ordinary directs the issues of fact in a cause to be tried by a jury, the questions of fact raised by the pleadings are to be briefly stated in writing by the petitioner, and settled by one of the registrars.

42. Should the petitioner fail to prepare and deposit the questions for settlement in the registry within fourteen days after the Judge Ordinary has directed the mode of trial, either of the respondents on whose behalf such questions have been raised shall be at liberty to do so.

43. After the questions have been settled by the registrar, the party who has deposited the same shall deliver a copy thereof as settled to each of the other parties to be heard on the trial of the cause, and either of such parties shall be at liberty to apply to the Judge Ordinary, by summons within eight days, or at the expiration of that time on the next day appointed for hearing summonses in this Court, to alter or amend the same, and his decision shall be final.

Setting down the Cause for Trial or Hearing.

44. In cases to be tried by a jury, the petitioner, after the expiration of eight days from the delivery of copies of the questions for the jury to the opposite parties, or from alteration or amendment of the same, in pursuance of the order of the Judge Ordinary, shall file such questions as finally settled in the registry, and at the same time set down the cause as ready for trial, and on the same day give notice of his having done so to each party for whom an appearance has been entered.

See also Rule 206.

45. In cases to be heard without a jury, the petitioner shall, after obtaining directions as to the mode of hearing, set the cause down for hearing, and on the same day give notice of his having done so to each party in the cause for whom an appearance has been entered.

See also Rules 205 and 206.

46. If the petitioner fail to file the questions for the jury, or to set down the cause for trial or hearing, or to give due notice thereof, for the space of one month, after directions have been given as to the mode in which the cause shall be tried or heard, either of the respondents entitled to be heard at such trial or hearing may file the questions for the jury, and set the cause down for trial or hearing, and shall on the same day give notice of his having done so to the petitioner, and to each of the other parties to the cause for whom an appearance has been entered.

47. A copy of every notice of the cause being set down for trial or hearing shall be filed in the registry, and the cause shall come on in its turn, unless the Judge Ordinary shall otherwise direct.

Trial or Hearing.

48. No cause shall be called on for trial or hearing until after the expiration of ten days from the day when the same has been set down for trial or hearing, and notice thereof has been given, save with the consent of all parties to the suit.

49. The registrar shall enter in the Court Book the finding of the jury and the decree of the Court, and shall sign the same.

50. Either of the respondents in the cause, after entering an appearance, without filing an answer to the petition in the principal cause, may be heard in respect of any question as to costs, and a respondent, who is husband or wife of the petitioner, may be heard also in respect to any question as to custody of children, but a respondent who may be so heard is not at liberty to bring in affidavits touching matters in issue in the principal cause, and no such affidavits can be read or made use of as evidence in the cause.

Evidence taken by Affidavit.

51. When the Judge Ordinary has directed that all or any of the facts set forth in the pleadings be proved by affidavits, such affidavits shall be filed in the registry within eight days from the time when such direction was given, unless the Judge Ordinary shall otherwise direct.

See also Rule 188.

52. Counter-affidavits as to any facts to be proved by affidavit may be filed within eight days from the filing of the affidavits which they are intended to answer.

53. Copies of all such affidavits and counter-affidavits shall on the day the same are filed be delivered to the other parties to be heard on the trial or hearing of the cause, or to their proctors, solicitors, or attorneys.

54. Affidavits in reply to such counter-affidavits cannot be filed without permission of the Judge Ordinary or of the registrars in his absence.

55. Application for an order for the attendance of a deponent for the purpose of being cross-examined in open Court shall be made to the Judge Ordinary, on summons.

Proceedings by Petition.

56. Any party to a cause who has entered an appearance may apply on summons to the Judge Ordinary, or in his absence to the registrars, to be heard on his petition touching any collateral question which may arise in a suit.

57. The party to whom leave has been given to be heard on his petition shall within eight days file his act on petition in the registry, and on the same day deliver a copy thereof to such parties in the cause as are required to answer thereto.

58. Each party to whom a copy of an act on petition is delivered shall within eight days after receiving the same file

his or her answer thereto in the registry, and on the same day deliver a copy thereof to the opposite party, and the same course shall be pursued with respect to the reply, rejoinder, &c., until the act on petition is concluded.

59. A Form of Act on Petition, Answer, and Conclusion is given in Appendix A (see pp. 398—403).

60. Each party to the act on petition shall within eight days from that on which the last statement in answer is filed, file in the registry such affidavits and other proofs as may be necessary in support of their several averments.

61. After the time for filing affidavits and proofs has expired, the party filing the act on petition is to set down the petition for hearing in the same manner as a cause; and in the event of his failing to do so within a month any party who has filed an answer thereto may set the same down for hearing, and the petition will be heard in its turn with other causes to be heard by the Judge Ordinary without a jury.

New Trial and Hearing (b).

62. An application for a new trial of the issues of fact tried by a jury or for a re-hearing of a cause shall be made to a Divisional Court of the Probate, Divorce, and Admiralty Division, and shall be by notice of motion filed in the registry, stating the grounds of the application, and whether all or part only of the verdict, or findings, or decree is complained of; and such notice of motion shall be filed and served upon the other parties in the cause, or their solicitors, within eight days after the trial or hearing, and the motion shall be made eight days after service of the notice of motion, if a Divisional Court shall be then sitting, or otherwise on the first day appointed for a sitting of the Divisional Court after the expiration of the eight days, and the time of the vacations shall not be reckoned in the computation of time for serving such notice of motion.

62A. The notice of motion may be amended at any time by leave of the Court or a judge on such terms as the Court or judge may think fit.

(b) Since the passing of the Judicature Act, 1890, every application for a new trial must be made in the first instance to the Court of Appeal. A motion for a re-hearing, however, is still to be made in the first instance to the Divisional Court: *Smith v. Smith*, C. A. (1897) 293.

Petition for reversal of Decree of Judicial Separation.

63. A petition to the Court for the reversal of a decree of judicial separation must set out the grounds on which the petitioner relies.—A form of such Petition is given in Appendix A (see p. 406).

64. Before such a petition can be filed, an appearance on behalf of the party praying for a reversal of the decree of judicial separation must be entered in the cause in which the decree has been pronounced.

65. A certified copy of such a petition, under seal of the Court, shall be delivered personally to the party in the cause in whose favour the decree has been made, who may within fourteen days file an answer thereto in the registry, and shall on the day on which the answer is filed deliver a copy thereof to the other party in the cause, or to his or her proctor, solicitor, or attorney.

66. All subsequent pleadings and proceedings arising from such petition and answer shall be filed and carried on in the same manner as before directed in respect of an original petition for judicial separation, and answer thereto, so far as such directions are applicable.

Demurrer.

67. All demurrers are to be set down for hearing in the same manner as causes, and will come on in their turn with other causes to be heard by the Judge Ordinary without a jury, unless the Judge Ordinary shall direct otherwise.

Intervention of the Queen's Proctor.

68. The Queen's Proctor shall, within fourteen days after he has obtained leave to intervene in any cause, enter an appearance and plead to the petition; and on the day he files his plea in the registry shall deliver a copy thereof to the petitioner, or to his proctor, solicitor, or attorney.

69. All subsequent pleadings and proceedings in respect to the Queen's Proctor's intervention in a cause shall be filed and carried on in the same manner as before directed in respect of the pleadings and proceedings of the original parties to the cause.

See also Rule 202.

Showing Cause against a Decree.

70. Any person wishing to show cause against making absolute a decree nisi for dissolution of a marriage shall enter an appearance in the cause in which such decree nisi has been pronounced.

71. Every such person shall at the time of entering an appearance, or within four days thereafter, file affidavits setting forth the facts upon which he relies.

72. Upon the same day on which such person files his affidavits he shall deliver a copy of the same to the party in the cause in whose favour the decree nisi has been pronounced.

73. The party in the cause in whose favour the decree nisi has been pronounced may, within eight days after delivery of the affidavits, file affidavits in answer, and shall, upon the day such affidavits are filed, deliver a copy thereof to the person showing cause against the decree being made absolute.

74. The person showing cause against the decree nisi being made absolute may within eight days file affidavits in reply, and shall upon the same day deliver copies thereof to the party supporting the decree nisi.

75. No affidavits are to be filed in rejoinder to the affidavits in reply without permission of the Judge Ordinary or of one of the registrars in his absence.

76. The questions raised on such affidavits shall be argued in such manner and at such time as the Judge Ordinary may on application by motion direct; and if he thinks fit to direct any controverted questions of fact to be tried by a jury, the same shall be settled and tried in the same manner and subject to the same rules as any other issue tried in this Court.

Rules 70 to 76 not applicable to the Queen's Proctor. *See* Rule 202.

Appeals to the full Court (c).

77. An appeal to the full Court from a decision of the Judge Ordinary must be asserted in writing and the instrument of appeal filed in the registry within the time allowed by law for appealing from such decision; and on the same day on which the appeal is filed, notice thereof, and a copy of the appeal, shall be delivered to each respondent in the appeal, or to his or her proctor, solicitor, or attorney.

78. The appellant within ten days after filing his instrument of appeal, or within such further time as may be allowed by the Judge Ordinary, or by the registrars in his absence, shall file in the registry his case in support of the appeal in triplicate, and on the same day deliver a copy thereof to each respondent in the appeal, or to his proctor, solicitor, or attorney, who, within ten

(c) Now the Court of Appeal.

days from the time of such filing and delivery or from such further time as may be allowed for the purpose by the Judge Ordinary, or the registrars in his absence, shall be at liberty to file in the registry a case against the appeal, also in triplicate, and the respondent shall on the same day deliver a copy thereof to the appellant, or to his proctor, solicitor, or attorney.

79. After the expiration of ten days from the time when the respondent has filed his case, or, if he has filed none, from the time allowed him for the purpose, the appeal shall stand for hearing at the next sittings of the full Court, and will be called on in its turn, unless otherwise directed.

Decree absolute.

80. All applications to make absolute a decree nisi for dissolution of a marriage must be made to the Court by motion. In support of such applications it must be shown by affidavit filed with the case for motion that search has been made in the proper books at the registry up to within two days of the affidavit being filed, and that at such time no person had obtained leave to intervene in the cause, and that no appearance had been entered nor any affidavits filed on behalf of any person wishing to show cause against the decree nisi being made absolute; and in case leave to intervene had been obtained, or appearance entered, or affidavits filed on behalf of any such person, it must be shown by affidavit what proceedings, if any, had been taken thereon, but it shall not be necessary to file a copy of the decree nisi.

See also Rules 194 and 207.

Alimony.

81. The wife, being the petitioner in a cause, may file her petition for alimony pending suit at any time after the citation has been duly served on the husband, or after order made by the Judge Ordinary to dispense with such service, provided the factum of marriage between the parties is established by affidavit previously filed.

82. The wife, being the respondent in a cause, after having entered an appearance, may also file her petition for alimony pending suit.

83. A Form of Petition for Alimony is given in Appendix A (see p. 447).

84. The husband shall, within eight days after the filing and

delivery of a petition for alimony, file his answer thereto upon oath.

85. The husband, being respondent in the cause, must enter an appearance before he can file an answer to a petition for alimony.

86. The wife, if not satisfied with the husband's answer, may object to the same as insufficient, and apply to the Judge Ordinary on motion to order him to give a further and fuller answer, or to order his attendance on the hearing of the petition for the purpose of being examined thereon.

See also Rule 189.

87. In case the answer of the husband alleges that the wife has property of her own, she may (within eight days) file a reply on oath to that allegation; but the husband is not at liberty to file a rejoinder to such reply without permission of the Judge Ordinary, or of one of the registrars in his absence.

88. A copy of every petition for alimony, answer and reply, must be delivered to the opposite party, or to his or her proctor, solicitor, or attorney, on the day the same is filed.

89. After the husband has filed his answer to the petition for alimony (subject to any order as to costs), or, if no answer is filed, at the expiration of the time allowed for filing an answer, the wife may proceed to examine witnesses in support of her petition, and apply by motion for an allotment of alimony pending suit, notice of the motion, and of the intention to examine witnesses, being given to the husband, or to his proctor, solicitor, or attorney, four days previously to the motion being heard and the witnesses examined, unless the Judge Ordinary shall dispense with such notice.

See also Rules 191 and 192.

90. No affidavits can be read or made use of as evidence in support of or in opposition to the averments contained in a petition for alimony, or in an answer to such a petition, or in a reply, except such as may be required by the Judge Ordinary or by one of the registrars.

91. A wife who has obtained a final decree of judicial separation in her favour, and has previously thereto filed her petition for alimony pending suit, on such decree being affirmed on appeal to the full Court, or after the expiration of the time for appealing against the decree, if no appeal be then pending, may apply to the Judge Ordinary by motion for an allotment of permanent alimony; provided that she shall, eight days at least before making such application, give notice thereof to the husband, or to his proctor, solicitor, or attorney.

See also Rule 190.

92. A wife may at any time after alimony has been allotted to her, whether alimony pending suit or permanent alimony, file her petition for an increase of the alimony allotted by reason of the increased faculties of the husband, or the husband may file a petition for a diminution of the alimony allotted by reason of reduced faculties; and the course of proceeding in such cases shall be the same as required by these rules and regulations in respect of the original petition for alimony, and the allotment thereof, so far as the same are applicable.

93. Permanent alimony shall, unless otherwise ordered, commence and be computed from the date of the final decree of the Judge Ordinary, or of the full Court on appeal, as the case may be.

94. Alimony, pending suit, and also permanent alimony, shall be paid to the wife, or to some person or persons to be nominated in writing by her, and approved of by the Court, as trustee or trustees on her behalf.

Maintenance and Settlements.

95. Applications to the Court to exercise the authority given by sections 32 and 45 of 20 & 21 Vict. c. 85, and by section 5 of the 22 & 23 Vict. c. 61, are to be made in a separate petition, which must, unless by leave of the judge, be filed as soon as by the said statutes such applications can be made, or within one month thereafter.

96. In cases of application for maintenance under section 32 of the 20 & 21 Vict. c. 85, such petition may be filed as soon as a decree nisi has been pronounced, but not before.

97. A certified copy of such petition, under seal of the Court, shall be personally served on the husband or wife (as the case may be), and on the person or persons who may have any legal or beneficial interest in the property in respect of which the application is made, unless the Judge Ordinary on motion shall direct any other mode of service, or dispense with service of the same on them or either of them.

98. The husband or wife (as the case may be), and the other person or persons (if any) who are served with such petition, within fourteen days after service, may file his, her, or their answer on oath to the said petition, and shall on the same day deliver a copy thereof to the opposite party, or to his proctor, solicitor, or attorney.

99. Any person served with the petition, not being a party to the principal cause, must enter an appearance before he or she can file an answer thereto.

100. Within fourteen days from the filing the answer, the opposite party may file a reply thereto, and the same period shall be allowed for filing any further pleading by way of rejoinder.

101. Such pleadings, when completed, shall in the first instance be referred to one of the registrars, who shall investigate the averments therein contained, in the presence of the parties, their proctors, solicitors, or attorneys, and who for that purpose shall be at liberty to require the production of any documents referred to in such pleadings, or to call for any affidavits, and shall report in writing to the Court the result of his investigation, and any special circumstances to be taken into consideration with reference to the prayer of the petition.

See also Rule 204.

102. The report of the registrar shall be filed in the registry by the husband or wife on whose behalf the petition has been filed, who shall give notice thereof to the other parties heard by the registrar; and either of the parties, within fourteen days after such notice has been given, if the Judge Ordinary be then sitting to hear motions, otherwise on the first day appointed for motions after the expiration of fourteen days, may be heard by the Judge Ordinary on motion in objection to the registrar's report, or may apply on motion for a decree or order to confirm the same, and to carry out the prayer of the petition.

103. The costs of a wife of and arising from the said petition or answer shall not be allowed on taxation of costs against the husband before the final decree in the principal cause, without direction of the Judge Ordinary.

Custody of and Access to Children.

104. Before the trial or hearing of a cause a husband or wife who are parties to it may apply for an order with respect to the custody, maintenance, or education of or for access to children, issue of their marriage, to the Judge Ordinary, by motion founded on affidavit.

See also Rule 212.

Guardians to Minors.

105. A minor above the age of seven years may elect any one or more of his or her next of kin, or next friends, as guardian, for the purpose of proceeding on his or her behalf as petitioner, respondent, or intervener in a cause.

106. The necessary instrument of election must be filed in the registry before the guardian elected can be permitted to extract a citation or to enter an appearance on behalf of the minor.

107. When a minor shall elect some person or persons other than his or her next of kin, as guardian for the purposes of a suit, or when an infant (under the age of seven years) becomes a party to a suit, application, founded on affidavit, is to be made to one of the registrars, who will assign a guardian to the minor or infant for such suit.

108. It shall not be necessary for a minor who, as an alleged adulterer, is made a co-respondent in a suit, to elect a guardian or to have a guardian assigned to him for the purpose of conducting his defence.

Subpœnas.

109. Every subpœna shall be written or printed on parchment, and may include the names of any number of witnesses. The party issuing the same, or his or her proctor, solicitor, or attorney, shall take it, together with a præcipe, to the registry, and there get it signed and sealed, and there deposit the præcipe.

See also Rule 180.

Writs of Attachment and other Writs.

110. Applications for writs of attachment, and also for writs of fieri facias and of sequestration, must be made to the Judge Ordinary by motion in Court.

See also Rules 179 and 203.

111. Such writs, when ordered to issue, are to be prepared by the party at whose instance the order has been obtained, and taken to the registry, with an office copy of the order, and, when approved and signed by one of the registrars, shall be sealed with the seal of the Court, and it shall not be necessary for the Judge Ordinary or for other judges of the Court to sign such writs.

112. Any person in custody under a writ of attachment may apply for his or her discharge to the Judge Ordinary if the Court be then sitting; if not, then to one of the registrars, who for good cause shown shall have power to order such discharge.

Notices.

113. All notices required by these rules and regulations, or by the practice of the Court shall be in writing, and signed by the party, or by his or her proctor, solicitor, or attorney.

Service of Notices, &c.

114. It shall be sufficient to leave all notices and copies of pleadings and other instruments which by these rules and regulations are required to be given or delivered to the opposite parties in the cause, or to their proctors, solicitors, or attorneys, and personal service of which is not expressly required at the address furnished as aforesaid by the petitioner and respondent respectively.

See also Rule 39.

115. When it is necessary to give notice of any motion to be made to the Court, such notice shall be served on the opposite parties who have entered an appearance four clear days previously to the hearing of such motion, and a copy of the notice so served shall be filed in the registry with the case for motion, but no proof of the service of the notice will be required, unless by direction of the Judge Ordinary.

116. If an order be obtained on motion without due notice to the opposite parties, such order will be rescinded on the application of the parties upon whom the notice should have been served; and the expense of and arising from the rescinding of such order shall fall on the party who obtained it, unless the Judge Ordinary shall otherwise direct.

117. When it is necessary to serve personally any order or decree of the Court, the original order or decree, or an office copy thereof, under seal of the Court, must be produced to the party served, and annexed to the affidavit of service marked as an exhibit by the commissioner or other person before whom the affidavit is sworn.

Office Copies, Extracts, &c.

118. The registrars of the principal registry of the Court of Probate are to have the custody of all pleadings and other documents now or hereafter to be brought in or filed, and of all entries of orders and decrees made in any matter or suit depending in the Court for Divorce and Matrimonial Causes; and all rules and orders, and fees payable in respect of searches for and inspection or copies of and extracts from and attendance with books and documents in the registry of the Court of Probate, shall extend to such pleadings and other documents brought in or filed, and all entries of orders and decrees made in the Court for Divorce and Matrimonial Causes, save that the length of copies and extracts shall in all cases be computed at the rate of seventy-two words per folio.

119. Office copies or extracts furnished from the registry of the Court of Probate will not be collated with the originals from which the same are copied, unless specially required. Every copy so required to be examined shall be certified under the hand of one of the principal registrars of the Court of Probate to be an examined copy.

120. The seal of the Court will not be affixed to any copy which is not certified to be an examined copy.

Time fixed by these Rules.

121. The Judge Ordinary shall in every case in which a time is fixed by these rules and regulations for the performance of any act, or for any proceeding in default, have power to extend the same to such time and with such qualifications and restrictions and on such terms as to him may seem fit.

122. To prevent the time limited for the performance of any act, or for any proceeding in default, from expiring before application can be made to the Judge Ordinary for an extension thereof, any one of the registrars may, upon reasonable cause being shown, extend the time, provided that such time shall in no case be extended beyond the day upon which the Judge Ordinary shall next sit in chambers.

See also Rules 181 to 184.

123. The time fixed by these rules and regulations for the performance of any act, or for any proceeding in a cause, shall in all cases be exclusive of Sundays, Christmas Day, and Good Friday.

Protection Orders.

124. Applications on the part of a wife deserted by her husband for an order to protect her earnings and property, acquired since the commencement of such desertion, shall be made in writing to the Judge Ordinary in chambers, and supported by affidavit.

See also Rule 197.

125. Applications for the discharge of any order made to protect the earnings and property of a wife are to be made to the Judge Ordinary by motion, and supported by affidavit. Notice of such motion, and copies of any affidavit or other document to be read or used in support thereof, must be personally served on the wife eight clear days before the motion is heard.

Bond not required.

126. On a decree of judicial separation being pronounced, it shall not be necessary for either party to enter into a bond conditioned against marrying again.

Change of Proctor, Solicitor, or Attorney.

127 and 128. Any party to a cause shall be at liberty to change his or her solicitor, without an order for that purpose upon notice of such change, containing an address for service of pleadings and other instruments, within three miles of the General Post Office, being filed in the registry, but until such notice is filed and a copy thereof served on the other parties in the cause, the former solicitor shall be considered the solicitor of the party.

Order for the immediate Examination of Witness.

129. Application for an order for the immediate examination of a witness who is within the jurisdiction of the Court is to be made to the Judge Ordinary, or to the registrars in his absence, by summons, or if on behalf of a petitioner proceeding in default of appearance of the parties cited in the cause without summons before one of the registrars, who will direct the order to issue, or refer the application to the Judge Ordinary, as he may think fit.

See also Rules 181 to 184.

130. Such witness shall be examined *vivâ voce*, unless otherwise directed, before a person to be agreed upon by the parties in the cause, or to be nominated by the Judge Ordinary or by the registrars to whom the application for the order is made.

131. The parties entitled to cross-examine the witness to be examined under such an order shall have four clear days' notice of the time and place appointed for the examination, unless the Judge Ordinary or the registrars to whom the application is made for the order shall direct a shorter notice to be given.

Commissions and Requisitions for Examination of Witnesses.

132. Application for a commission or requisition to examine witnesses who are out of the jurisdiction of the Court is to be made by summons, or if on behalf of a petitioner proceeding in default of appearance without summons, before one of the registrars, who will order such commission or requisition to issue, or refer the application to the Judge Ordinary, as he may think fit.

133. A commission or requisition for examination of witnesses may be addressed to any person to be nominated and agreed upon by the parties in the cause, and approved of by the registrar, or for want of agreement to be nominated by the registrar to whom the application is made.

134. The commission or requisition is to be drawn up and pre-

pared by the party applying for the same, and a copy thereof shall be delivered to the parties entitled to cross-examine the witnesses to be examined thereunder two clear days before such commission or requisition shall issue, under seal of the Court, and they or either of them may apply to one of the registrars by summons to alter or amend the commission or requisition, or to insert any special provision therein, and the registrar shall make an order on such application, or refer the matter to the Judge Ordinary.

135. Any of the parties to the cause may apply to one of the registrars by summons for leave to join in a commission or requisition, and to examine witnesses thereunder; and the registrar to whom the application is made may direct the necessary alterations to be made in the commission or requisition for that purpose, and settle the same, or refer the application to the Judge Ordinary.

136. After the issuing of a summons to show cause why a party to the cause should not have leave to join in a commission or requisition, such commission or requisition shall not issue under seal without the direction of one of the registrars.

137. In case a husband or wife shall apply for and obtain an order or a commission or requisition for the examination of witnesses, the wife shall be at liberty, without any special order for that purpose, to apply by summons to one of the registrars to ascertain and report to the Court what is a sufficient sum of money to be paid or secured to the wife to cover her expenses in attending at the examination of such witnesses in pursuance of such order, or in virtue of such commission or requisition, and such sum of money shall be paid or secured before such order or such commission or requisition shall issue from the registry, unless the Judge Ordinary or one of the registrars in his absence shall otherwise direct.

See also Rule 198.

Affidavits.

138. Every affidavit is to be drawn in the first person, and the addition and true place of abode of every deponent is to be inserted therein.

139. In every affidavit made by two or more persons, the names of the several persons making it are to be written in the jurat, except that if the affidavit of all the deponents is taken at one time by the same officer, it shall be sufficient to state that it was sworn by both (or all) of the above-named deponents.

140. No affidavit having, in the jurat or body thereof, any

interlineation, alteration, or erasure shall, without leave of the Court or of one of the registrars, be filed or made use of in any matrimonial cause or matter unless the interlineation or alteration (other than by erasure) is authenticated by the initials of the officer taking the affidavit, nor, in the case of an erasure, unless the words or figures appearing at the time of taking the affidavit to be written on the erasure, are re-written and signed and initialed in the margin of the affidavit by the officer taking it.

141. Where an affidavit is made by any person who is blind, or who, from his or her signature or otherwise, appears to be illiterate, the registrar, commissioner, or other authority before whom such affidavit is made is to state in the jurat that the affidavit was read in the presence of the party making the same, and that such party seemed perfectly to understand the same, and also made his or her mark, or wrote his or her signature thereto, in the presence of the registrar, commissioner, or other authority before whom the affidavit was made.

142. No affidavit is to be deemed sufficient which has been sworn before the party on whose behalf the same is offered, or before his or her proctor, solicitor, or attorney, or before a partner or clerk of his or her proctor, solicitor, or attorney.

143. Proctors, solicitors, and attorneys, and their clerks respectively, if acting for any other proctor, solicitor, or attorney, shall be subject to the rules and regulations in respect of taking affidavits which are applicable to those in whose stead they are acting.

144. No affidavit can be read or used unless the proper stamps to denote the fees payable on filing the same are delivered with such affidavit.

145. Where a special time is fixed for filing affidavits, no affidavit filed after that time shall be used unless by leave of the Judge Ordinary.

146. The above rules and regulations in respect of affidavits shall, so far as the same are applicable, be observed in respect to affirmations and declarations to be read or used in the Court for Divorce and Matrimonial Causes.

Cases for Motion.

147. Cases for motion are to set forth the style and object of, and the names and descriptions of the parties to, the cause or proceeding before the Court; the proceedings already had in the cause, and the dates of the same; the prayer of the party on whose

behalf the motion is made, and briefly, the circumstances on which it is founded.

148. If the cases tendered are deficient in any of the above particulars, the same shall not be received in the registry without permission of one of the registrars.

149. On depositing the case in the registry, and giving notice of the motion, the affidavits in support of the motion, and all original documents referred to in such affidavits, or to be referred to by counsel on the hearing of the motion, must be also left in the registry; or in case such affidavits or documents have been already filed or deposited in the registry, the same must be searched for, looked up, and deposited with the proper clerk, in order to their being sent with the case to the Judge Ordinary.

150. Copies of any affidavit or documents to be read or used in support of a motion are to be delivered to the opposite parties to the suit who are entitled to be heard in opposition thereto.

Taxing Bills of Costs.

151. All bills of costs are referred to the registrars of the principal registry of the Court of Probate for taxation, and may be taxed by them, without any special order for that purpose. Such bills are to be filed in the registry.

See also Rule 177.

152. Notice of the time appointed for taxation will be forwarded to the party filing the bill, at the address furnished by such party.

153. The party who has obtained an appointment to tax a bill of costs shall give the other party or parties to be heard on the taxation thereof at least one clear day's notice of such appointment, and shall at or before the same time deliver to him or them a copy of the bill to be taxed.

154. When an appointment has been made by a registrar of the Court of Probate for taxing any bill of costs, and any parties to be heard on the taxation do not attend at the time appointed, the registrar may nevertheless proceed to tax the bill after the expiration of a quarter of an hour, upon being satisfied by affidavit that the parties not in attendance had due notice of the time appointed.

155. The bill of costs of any proctor, solicitor, or attorney will be taxed on his application as against his client, after sufficient notice given to the person or persons liable for the payment thereof, or on the application of such person or persons, after sufficient notice given to the practitioner.

156. The fees payable on the taxation of any bill of costs shall be paid by the party on whose application the bill is taxed, and shall be allowed as part of such bill; but if more than one-sixth of the amount of any bill of costs taxed as between practitioner and client is disallowed on the taxation thereof, no costs incurred in such taxation shall be allowed as part of such bill.

See also Rule 200.

157. If an order for payment of costs is required, the same may be obtained by summons, on the amount of such costs being certified by the registrar.

See also Rules 178, 179, and 201.

Wife's Costs.—As amended 14th July, 1875.

158. After directions given as to the mode of hearing or trial of a cause or in an earlier stage of a cause by order of the Judge Ordinary, or of the registrars, to be obtained on summons, a wife who is petitioner, or has entered an appearance as respondent in a cause, may file her bill or bills of costs for taxation as against her husband, and the registrar to whom such bills of costs are referred for taxation shall, when directions as to the mode of hearing or trial have been given, ascertain what is a sufficient sum of money to be paid into the registry, or what is a sufficient security to be given by the husband to cover the costs of the wife of and incidental to the hearing of the cause; and shall thereupon issue an order upon the husband to pay or secure the said sum within a time to be fixed by the registrar; provided that in case the husband should by reason of his wife having separate property, or for other reasons, dispute her right to recover any costs pending suit against him, the registrar may suspend the order to pay the wife's taxed costs, or to pay or secure the sum ascertained to be sufficient to cover her costs of and incidental to the hearing of the cause, for such length of time as shall seem to him necessary to enable the husband to obtain the decision of the Court as to his liability.

But see Rule 205.

159. When on the hearing or trial of a cause the decision of the Judge Ordinary or the verdict of the jury is against the wife, no costs of the wife of and incidental to such hearing or trial shall be allowed as against the husband, except such as shall be applied for, and ordered to be allowed by the Judge Ordinary, at the time of such hearing or trial.

See also Rule 201.

Summonses.

160. A summons may be taken out by any person in any matter or suit depending in the Court for Divorce and Matrimonial Causes, provided there is no rule or practice requiring a different mode of proceeding.

161. The name of the cause or matter, and of the agent taking out the summons, is to be entered in the Summons Book, and a true copy of the summons is to be served on the party summoned one clear day at least before the summons is returnable, and before 7 o'clock p.m. On Saturdays the copy of the summons is to be served before 2 o'clock p.m.

162. On the day and at the hour named in the summons the party taking out the same is to present himself with the original summons at the judge's chambers, or elsewhere appointed for hearing the same.

163. Both parties will be heard by the Judge Ordinary, who will make such order as he may think fit, and a minute of such order will be made by one of the registrars in the Summons Book.

See also Rules 181 to 184.

164. If the party summoned do not appear after the lapse of half an hour from the time named in the summons, the party taking out the summons shall be at liberty to go before the Judge Ordinary, who will thereupon make such order as he may think fit.

165. An attendance on behalf of the party summoned for the space of half an hour, if the party taking out the summons do not during such time appear, will be deemed sufficient, and bar the party taking out the summons from the right to go before the Judge Ordinary on that occasion.

166. If a formal order is desired, the same may be had on the application of either party, and for that purpose the original summons, or the copy served on the party summoned, must be filed in the registry. An order will thereupon be drawn up, and delivered to the person filing such summons or copy.

167. If a summons is brought to the registry, with consent to an order endorsed thereon, signed by the party summoned, or by his proctor, solicitor, or attorney, an order will be drawn up without the necessity of going before the Judge Ordinary; provided that the order sought is in the opinion of the registrar one which, under the circumstances, would be made by the Judge Ordinary.

168. The same rules and regulations shall, so far as applicable,

be observed in respect of summonses which may be heard and disposed of by the registrars.

Payment of Money out of Court.

169, 170 and 171. Proceedings altered by "Supreme Court Funds Rules, 1884."

Registries and Officers.

172. The registry for the Court for Divorce and Matrimonial Causes, and the clerks employed therein, shall be subject to and under the control of the registrars of the principal registry of the Court of Probate.

173. The record keepers, the sealer, and other officers of the principal registry of the Court of Probate, shall discharge the same or similar duties in the Court for Divorce and Matrimonial Causes, and in the registry thereof, as they discharge in the Court of Probate and the principal registry thereof.

Proceedings under "The Legitimacy Declaration Act, 1858."

174. The above rules and regulations, so far as the same may be applicable, shall extend to applications and proceedings under "The Legitimacy Declaration Act, 1858."

ADDITIONAL RULES, 30TH JANUARY, 1869.

Restitution of Conjugal Rights.

175. The affidavit filed with the petition, as required by Rule 2, shall further state sufficient facts to satisfy one of the registrars that a written demand for cohabitation and restitution of conjugal rights has been made by the petitioner upon the party to be cited, and that after a reasonable opportunity for compliance therewith such cohabitation and restitution of conjugal rights have been withheld.

176. At any time after the commencement of proceedings for restitution of conjugal rights the respondent may apply by summons to the judge, or to the registrars in his absence, for an order to stay the proceedings in the cause by reason that he or she is willing to resume or to return to cohabitation with the petitioner.

As to Costs.

177. In all cases in which the Court at the hearing of a cause condemns any party to the suit in costs, the proctor, solicitor, or

attorney of the party to whom such costs are to be paid may forthwith file his bill of costs in the registry, and obtain an appointment for the taxation, provided that such taxation shall not take place before the time allowed for moving for a new trial or re-hearing shall have expired; or, in case a rule nisi should have been granted, until the rule is disposed of, unless the Judge Ordinary shall, for cause shown, direct a more speedy taxation.

178. Upon the registrar's certificate of costs being signed, he shall at once issue an order of the Court for payment of the amount within seven days.

See also Rules from 151 to 158, and 201.

179. This order shall be served on the proctor, solicitor, or attorney of the party liable, [or if it is desired to enforce the order by attachment on the party himself,] and if the costs be not paid within the seven days a writ of fieri facias or writ of sequestration shall be issued as of course in the registry, upon an affidavit of service of the order and non-payment.

See also Rules 110, 111, and 203.

As to Subpœnas.

180. The issuing of fresh subpœnas in each term shall be abolished, and it shall not be necessary to serve more than one subpœna upon any witness.

ADDITIONAL AND AMENDED RULES, 23RD FEBRUARY, 1875.

181. All summonses heretofore heard by the registrars of the principal registry of the Court of Probate in the absence of the Judge Ordinary shall hereafter be heard before one or more of the registrars at the principal registry of that Court during the period appointed for the sittings of the Court at Westminster, as well as in the judge's absence.

182. All rules and regulations in respect to summonses now heard before the Judge Ordinary in Chambers at Westminster shall, so far as the same are applicable, be observed in respect of the summonses heard before one or more of the registrars at the principal registry.

See Rules from 160 to 168.

183. The registrar before whom the summons is heard will direct such order to issue as he shall think fit, or refer the matter at once to the Judge Ordinary.

184. Any person heard on the summons objecting to the order so issued under the direction of the registrars may, subject to any

order as to costs, apply to the Judge Ordinary on summons to rescind or vary the same.

ADDITIONAL RULES, 14TH JULY, 1875.

Appearance.

185. Application for leave to enter an appearance after a proceeding has been taken in default heretofore made to the Judge Ordinary on motion in pursuance of Rule 20 shall hereafter be made by summons before one of the registrars.

See also Rule 20.

Answer.

186. In case the time allowed for entry of appearance to a citation should be more than eight days after service thereof, a respondent who has entered an appearance may, within 14 days from the expiration of the time allowed for the entry of appearance, file in the registry an answer to the petition.

See also Rule 28.

General Rule as to Pleadings.

187. Either of the parties before the Court desiring to alter or amend a pleading may apply by summons to one of the registrars for an order for that purpose.

See also Rule 34.

Evidence taken by Affidavit.

188. In an undefended cause when directions have been given that all or any of the facts set forth in the petition be proved by affidavits, such affidavits may be filed in the registry at any time up to 10 clear days before the cause is heard.

See also Rule 51.

Alimony.

189. Application for an order for a further and fuller answer to a petition for alimony, heretofore made to the Judge Ordinary on motion in pursuance of Rule 86, shall hereafter be made by summons before one of the registrars.

See Rule 86.

190. A wife who has obtained a final decree of judicial separation, on such decree being affirmed on appeal, or after the expiration of the time for appealing against the decree if no appeal be then pending, may apply to the Court by petition for an allotment of permanent alimony, though no alimony shall have been

allotted to her pending suit, and the Rules from 84 to 88, both inclusive, of the rules and regulations for this Court, bearing date 26th December, 1865, relating to petitions for alimony pending suit as varied by these and other additional rules and regulations shall, so far as the same are applicable, be observed in respect to the proceedings upon such petitions for permanent alimony.

See also Rules 84 to 88, and 91 and 92.

191. All applications for an allotment of alimony pending suit, and for an allotment of permanent alimony heretofore made to the Court by motion in pursuance of Rules 89 and 91, shall hereafter be referred to one of the registrars at the principal registry, who shall investigate the averments in the petition for alimony, answer, and reply, in the presence of the parties, their proctors, solicitors, or attorneys, and who, if he think fit, shall be at liberty to require the attendance of the husband for the purpose of being examined or cross-examined, and to take the oral evidence of witnesses, and to require the production of any documents or to call for affidavits, and shall direct such order to issue as he shall think fit, or refer the application, or any question arising out of it, to the Judge Ordinary for his decision.

See Rules 89 and 91.

192. Any person heard on the reference as to alimony before one of the registrars, objecting to the order issued under his direction, may (subject to any order as to costs) apply to the Judge Ordinary on summons to rescind or vary the same.

Dismissal of Petition.

193. When an order has been made for the dismissal of a petition on payment of costs, the cause will not be removed from the list of causes in the Court books without an order of one of the registrars, to obtain which it must be shown to his satisfaction that the costs have been paid.

Decree Absolute.

194. In case application by motion to make absolute a decree nisi for the dissolution of a marriage should from any cause be deferred beyond six days from the time when the affidavit required by Rule 80 is filed with the case for motion, it must be shown by further affidavit that search has been made in the proper books up to within six clear days of the motion for decree absolute being heard, and that at such time no person had obtained leave to intervene, and that no appearance had been

entered nor any affidavits filed on behalf of any person wishing to show cause against the decree nisi being made absolute; and in case leave to intervene had been obtained, or appearance entered or affidavits filed on behalf of any such person, it must also be shown by such further affidavit what proceedings, if any, have been taken thereon.

See also Rules 80 and 207.

Custody, Maintenance, and Education of Children.

195. Rules from 97 to 102, both inclusive, of the rules and regulations for this Court, bearing date 26th December, 1865, shall, so far as the same are applicable, be observed in respect to applications by petition, after a final decree in a cause for orders and provision with respect to the custody, maintenance, and education of children, the marriage of whose parents was the subject of the decree under the authority given to the Court by 22 & 23 Vict. c. 61, s. 4.

See Rules 97 to 102.

Persons of Unsound Mind.

196. A committee duly appointed of a person found by inquisition to be of unsound mind may take out a citation and prosecute a suit on behalf of such person as a petitioner, or enter an appearance, intervene, or proceed with the defence on behalf of such person as a respondent; but if no committee should have been appointed, application is to be made to one of the registrars, who will assign a guardian to the person of unsound mind, for the purpose of prosecuting, intervening in, or defending the suit on his or her behalf; provided that if the opposite party is already before the Court when the application for the assignment of a guardian is made he or she shall be served with notice by summons of such application.

Protection Orders.

197. In the affidavit in support of an application on the part of a wife deserted by her husband for an order to protect her earnings and property acquired since the commencement of such desertion, the applicant must state whether she has any knowledge of the residence of her husband, and if he is known to be residing within the jurisdiction of the Court, he must be served personally with a summons to show cause why such order should not be made.

See also Rule 124.

Commission and Requisitions for Examination of Witnesses.

198. The registrar to whom a commission or requisition for examination of witnesses is referred for settlement, on application on behalf of the wife, may proceed at once and without summons to ascertain what is a sufficient sum of money to be paid or secured to her to cover her expenses in attending at the examination of such witnesses, and shall thereupon issue an order upon the husband to pay or secure the said sum within a time to be fixed in such order.

See also Rule 137.

Costs.

199. The bond taken to secure the costs of a wife of and incidental to the hearing of a cause shall be filed in the registry of the Court of Probate, and shall not be delivered out or be sued upon without the order of the Court.

200. If more than one-sixth of the amount of any bill of costs taxed as between practitioner and client is disallowed on taxation thereof, the party on whose application the bill is taxed shall be at liberty to deduct the costs incurred by him in the taxation from the amount of the bill as taxed, if so much remains due, otherwise the same shall be paid by the practitioner to the person on whose application the bill is taxed.

See also Rule 156.

201. The order for payment of costs of suit in which a respondent or co-respondent has been condemned by a decree nisi shall, if applied for before the decree nisi is made absolute, direct the payment thereof into the registry of the Court of Probate, and such costs shall not be paid out of the said registry to the party entitled to receive them under the decree nisi until the decree absolute has been obtained; but a wife who is unsuccessful in a cause, and who at the hearing of the cause has, in pursuance of Rule 159, obtained an order of the Judge Ordinary that her costs of and incidental to the hearing or trial of the cause shall be allowed against her husband to the extent of the sum paid or secured by him to cover such costs, may nevertheless proceed at once to obtain payment of such costs after allowance thereof on taxation.

See also Rules 157, 178, and 179.

ADDITIONAL RULES, 17TH APRIL, 1877.

Showing Cause against a Decree Nisi.

202. When the Queen's Proctor desires to show cause against making absolute a decree nisi for dissolution or nullity of marriage, he shall enter an appearance in the cause in which such decree nisi has been pronounced, and shall within fourteen days after entering appearance file his plea in the registry, setting forth the grounds upon which he desires to show cause as aforesaid, and on the day he files his plea in the registry, shall deliver a copy thereof to the person in whose favour such decree has been pronounced, or to his or her solicitor, and all subsequent pleadings and proceedings in respect to such plea shall be filed and carried on in the same manner as directed by the existing Rules and Regulations Nos. 68 and 69, in regard to the plea of the Queen's Proctor, filed after obtaining leave to intervene in a cause, and the existing Rules and Regulations from No. 70 to No. 76, both inclusive, shall no longer be applicable to the Queen's Proctor on his showing cause as aforesaid, save as far as regards any proceedings already commenced in pursuance of the said rules and regulations.

See Rules 68 and 69.

Writs of Fieri Facias and other Writs.

203. In default of payment of any sum of money at the time appointed by any order of the Court for the payment thereof, a writ of fieri facias or writ of sequestration or writ of elegit shall be issued as of course in the registry upon an affidavit of service of the order and non-payment.

See also Rules 110, 111, and 179.

Maintenance and Settlements.

204. The registrar to whom pleadings are referred for investigation under Rule 101 shall, if he thinks fit, be at liberty to require the attendance of the husband or wife for the purpose of being examined or cross-examined, and to take the oral evidence of witnesses in the same manner as on a reference for an allotment of alimony.

See Rule 101.

ADDITIONAL AND AMENDED RULES, JULY, 1880.

Mode of Hearing or Trial.

205. It shall not be necessary in any case to apply to the Court by motion for directions as to the mode of hearing or trial of a cause. When the pleadings are concluded the parties to a cause may proceed in all respects as though upon the day of filing the last pleading a special direction had been given by the Court as to the mode of hearing or trial to the effect following:

1st. In cases in which damages are not claimed that the cause be heard by oral evidence before the Court itself, without a jury.

2nd. In cases in which damages are claimed that the cause be tried before the Court, with a common jury.

And any party to a cause may apply by summons for a direction that the cause may be heard or tried otherwise than is hereby provided.

See Rules 40 and 45.

206. Before a cause is set down for hearing or trial the pleadings and proceedings in the cause shall be referred to one of the registrars, who shall certify that the same are correct and in order, and the registrar to whom the same are referred shall cause any irregularity in such pleadings or proceedings to be corrected, or refer any question arising therefrom to the Court for its direction; any party to the cause objecting to such direction of the registrar may (subject to any order as to costs) apply to the Court on summons to rescind or vary the same.

Decree Absolute.

207. Application to make absolute a decree nisi for dissolution or nullity of a marriage need not hereafter be made to the Court by motion as directed by Rules 80 and 194, but it shall be a sufficient compliance with the said rules to file in the registry, with the affidavit or affidavits therein required, a notice in writing setting forth that application is made for such decree absolute, which will thereupon be pronounced in open Court at a time appointed for that purpose.

See Rules 80 and 194.

Suits in Formâ Pauperis.

208. Applications for leave to prosecute or defend a suit in formâ pauperis may hereafter be made to one of the registrars,

who will make such order thereon as he may see fit or refer the application to the Court.

209. The affidavit required by Rule 26, if application is made by a wife to prosecute a suit against her husband in formâ pauperis, shall state to the best of her knowledge and belief the amount of income or means of living of her husband.

See also Rules 25 and 26.

210. When a husband has been admitted to prosecute a suit against his wife in formâ pauperis, the wife may apply for an order that she be at liberty to proceed with her defence in formâ pauperis on production of an affidavit that she has no separate property exceeding 25*l.* in value after payment of her just debts.

211. When a wife has been permitted to prosecute a suit against her husband in formâ pauperis, the husband may apply for leave to proceed with his defence in formâ pauperis on production of an affidavit as to his income or means of living, and showing that besides his wearing apparel he is not worth 25*l.* after payment of his just debts.

Access to Children.

212. Application on behalf of a husband or wife, parties to a cause, for access to the children of their marriage may hereafter be made by summons before one of the registrars, who shall direct such order to issue as he thinks fit, subject to appeal to the Court by either party dissatisfied with the order as authorised by Rule 184.

See also Rules 104 and 184.

The Greek Marriages Act, 1884.

213. In pursuance of the provisions of the Act of Parliament 47 & 48 Vict. c. 20, s. 1, whereby it was enacted that any petition to the Probate and Matrimonial Division of her Majesty's High Court of Justice under the said Act should be accompanied by such affidavit verifying the same as the said Court might from time to time direct:

Now, I, the Right Honourable Sir James Hannen, Knight, the president of the said division, do hereby direct that the affidavit verifying a petition under the said Act shall be in the form and to the effect required by Rule 2 (z) of the rules and

regulations for her Majesty's Court for Divorce and Matrimonial Causes, bearing date 26th December, 1865.

(Signed) JAMES HANNEN.

Dated 6th August, 1884.

Maintenance and Settlements.

214. All applications to the Court to exercise the authority given by sections 2, 3 and 6 of 47 & 48 Vict. c. 68, are to be made in a petition, which may be filed as soon as by the said statutes such applications can be made, or at any time thereafter. (*Not before the decree is made or before the time has expired for compliance with such decree.*)

215. Rules 97 to 102, both inclusive, and 195 and 204, shall, so far as the same are applicable, be observed in respect to applications by petition to exercise the authority given by the aforesaid sections 2, 3 and 6 of 47 & 48 Vict. c. 68.

216. In divorce and matrimonial causes solicitors shall be entitled to charge, and be allowed the fees set forth in the column headed "Lower Scale" in Appendix N annexed to the Rules of the Supreme Court, 1883, so far as the same are applicable to such causes.

217. The fees set forth in the column headed "Higher Scale" in the said Appendix N, so far as the same are applicable, may be allowed either generally in any divorce or matrimonial cause, or as to the costs of any particular application made or business done therein if on special grounds arising out of the nature or importance or the difficulty or urgency of the case, the Court, or a judge, shall at the trial or hearing or further consideration of such a cause, or at the hearing of any application therein, whether the cause shall or shall not be brought to trial or hearing or to further consideration (as the case may be), so order, or if the taxing registrar, under directions given to him for that purpose by the Court or a judge, shall think that such allowance ought to be so made upon such special grounds as aforesaid.

218. Upon any reference to the taxing registrar to tax a bill of costs of a solicitor for the purpose of ascertaining the amount due to such solicitor in respect thereof, if such bill shall include charges for business done in any divorce or matrimonial cause, the taxing registrar may allow the fees set forth in the column "Higher Scale" in the said Appendix N, so far as the same are applicable in respect of such cause, or in respect of any particular application made or business done therein, if on such special

grounds, as in the last preceding rule mentioned, he shall think that such allowance ought to be so made.

219. (October 24th, 1904.) In all proceedings before the Court for Divorce and Matrimonial Causes, the petition shall state whether or no there has been any, and if so what, proceedings previous thereto with reference to the marriage in the Divorce Division of the High Court, by and on behalf of either of the parties to the marriage.

220. (October 24th, 1905.) In all proceedings before the Court for Divorce and Matrimonial Causes, the petition shall state the description of the husband and the place of residence, and the domicile of the parties to the marriage at the time of the institution of the suit.

“Explanation of above Rule” [220].

By direction of the President [Gorell Barnes] the following matters as they stand at the time of the institution of the suit must be inserted in the body of the petition:—

- (1.) The description of the husband.
- (2.) The place of residence of each of the parties to the marriage.
- (3.) The domicile of the parties to the marriage, but unless the petitioner is asserting a domicile for the wife different from that of the husband, it will be sufficient if the domicile of the husband is stated.

APPENDIX B.

PART I.

MATRIMONIAL CAUSES ACTS, 1857—1884.

20 & 21 VICT. c. 85 (MATRIMONIAL CAUSES ACT, 1857) (a).

An Act to amend the Law relating to Divorce and Matrimonial Causes in England. [28th August, 1857.]

Repealed
55 & 56 Vict.
c. 19 (b).

Ibid. as far
as the word
“operation.”

1. [Commencement of Act.]

2. *As soon as this Act shall come into operation*, all jurisdiction now exerciseable by any ecclesiastical court in England in respect of divorces à mensâ et thoro, suits of nullity of marriage, suits of jactitation of marriage, suits for restitution of conjugal rights, and in all causes, suits, and matters matrimonial, shall cease to be so exerciseable, except so far as relates to the granting of marriage licences, which may be granted as if this Act had not been passed.

Repealed by
55 & 56 Vict.
c. 19.

As to suits
pending when
this Act
comes into
operation.

3. [The Court may enforce decrees or orders made before this Act comes into operation.]

4. All suits and proceedings in causes and matters matrimonial which at the time when this Act comes into operation shall be pending in any ecclesiastical court in England, shall be transferred to, dealt with, and decided by the said Court for Divorce and Matrimonial Causes, as if the same had been originally instituted in the said Court.

Power to
judges whose
jurisdiction is
determined

5. Provided, that if at the time when this Act comes into operation, any cause or matter which would be transferred to the said Court for Divorce and Matrimonial Causes under the enact-

(a) Short title, “Matrimonial Causes Act, 1857”; collective title, “Matrimonial Causes Acts, 1857 to 1878” (59 & 60 Vict. c. 14).

(b) Short title, “Statute Law Revision Act, 1892.”

ment hereinbefore contained shall have been heard before any judge having jurisdiction in relation to such cause or matter, and be then standing for judgment, such judge may at any time within six weeks after the time when this Act comes into operation give in to one of the registrars attending the Court for Divorce and Matrimonial Causes a written judgment thereon signed by him; and a decree or order, as the case may require, shall be drawn up in pursuance of such judgment, and every such decree or order shall have the same force and effect as if it had been drawn up in pursuance of a judgment of the Court for Divorce and Matrimonial Causes on the day on which the same was delivered to the registrar, and shall be subject to appeal under this Act.

6. *As soon as this Act shall come into operation*, all jurisdiction now vested in or exercisable by any ecclesiastical court or person in England in respect of divorces à mensâ et thoro, suits of nullity of marriage, suits for restitution of conjugal rights, or jactitation of marriage, and in all causes, suits, and matters matrimonial, except in respect of marriage licences, shall belong to and be vested in Her Majesty; and such jurisdiction, together with the jurisdiction conferred by this Act, shall be exercised in the name of Her Majesty, in a court of record to be called "The Court for Divorce and Matrimonial Causes."

to deliver
written
judgments.

Repealed as
far as the
word "ope-
ration" by
55 & 56 Vict.
c. 19.

7. No decree shall hereafter be made for a divorce à mensâ et thoro; but in all cases in which a decree for a divorce à mensâ et thoro might now be pronounced, the court may pronounce a decree for a judicial separation, which shall have the same force and the same consequences as a divorce à mensâ et thoro now has.

No decree
for divorce
à mensâ et
thoro to
be made
hereafter, but
a judicial
separation.

8. [Judges of the Court.]

9. [Judge of the Court of Probate to be the judge ordinary.]

Repealed by 55
& 56 Vict. c. 19.
Ibid.

10. [Petitions for dissolution of marriage, &c. to be heard by three judges.]

Ibid.

11. [Acting judge during absence of the judge ordinary.]

Ibid.

12. The Court for Divorce and Matrimonial Causes shall hold its sittings at such place or places in London or Middlesex or elsewhere as Her Majesty in Council shall from time to time appoint.

Altered by
23 & 24 Vict.
c. 145, s. 4.

13. The Lord Chancellor shall direct a seal to be made for the said Court, and may direct the same to be broken, altered, and renewed, at his discretion; and all decrees and orders, or copies

Seal of the
Court.

of decrees or orders, of the said Court, sealed with the said seal, shall be received in evidence.

Repealed by
42 & 43 Vict.
c. 78 (c).

14. [Officers of the Court.]

Repealed by
55 & 56 Vict.
c. 19.

15. [Power to advocates, barristers, &c. to practice in the Court.]

Sentence of
judicial separa-
tion may
be obtained
by husband
or wife for
adultery, &c.

16. A sentence of judicial separation, (which shall have the effect of a divorce à mensâ et thoro under the existing law, and such other legal effect as herein mentioned), may be obtained, either by the husband or the wife, on the ground of adultery, or cruelty, or desertion without cause for two years and upwards.

Application
for restitution
of conjugal
rights or
judicial
separation,
may be made
by husband
or wife by
petition to
Court or to
judges of
assize.

17. Application for restitution of conjugal rights or for judicial separation on any one of the grounds aforesaid may be made by either husband or wife, by petition to the Court, [*repealed, as to the judges of assize, by Matrimonial Causes Act, 1858, s. 19*], and the Court or judge to which such petition is addressed, on being satisfied of the truth of the allegations therein contained, and that there is no legal ground why the same should not be granted, may decree such restitution of conjugal rights or judicial separation accordingly, and where the application is by the wife may make any order for alimony which shall be deemed just.

18. }
19. } [*Provisions as to proceedings before judges of assize*
20. } *repealed by Mat. Causes Act, 1858, s. 19.*]

Wife deserted
by her hus-
band may
apply to
a police
magistrate
or justices
in petty
sessions for
protection.

21. A wife deserted by her husband may at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or, if resident in the country, to justices in petty sessions, or in either case to the Court, for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of, after such desertion, against her husband or his creditors, or any person claiming under him; and such magistrates or justices or Court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him; and such earnings and property shall belong to the wife as if she were a feme sole: Provided always, that every such order, if made by a

police magistrate, or justices at petty sessions, shall, within ten days after the making thereof, be entered with the registrar of the county court within whose jurisdiction the wife is resident; and that it shall be lawful for the husband, and any creditor or other person claiming under him, to apply to the Court, or to the magistrate or justices by whom such order was made, for the discharge thereof: Provided also, that if the husband or any creditor of or other person claiming under the husband shall seize or continue to hold any property of the wife after notice of any such order, he shall be liable, at the suit of the wife (which she is hereby empowered to bring), to restore the specific property, and also for a sum equal to double the value of the property so seized or held after such notice as aforesaid: If any such order of protection be made, the wife shall during the continuance thereof be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation.

See Mat. C. Act, 1858, ss. 7, 8, 9, 10; 28 Vict. c. 44.

22. In all suits and proceedings, other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which, in the opinion of the said Court, shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief, but subject to the provisions herein contained, and to the rules and orders under this Act.

Court to act on principles of the ecclesiastical courts.

23. Any husband or wife, upon the application of whose wife or husband, as the case may be, a decree of judicial separation has been pronounced, may, at any time thereafter, present a petition to the Court, praying for a reversal of such decree on the ground that it was obtained in his or her absence, and that there was reasonable ground for the alleged desertion, where desertion was the ground of such decree; and the Court may, on being satisfied of the truth of the allegations of such petition, reverse the decree accordingly; but the reversal thereof shall not prejudice or affect the rights or remedies which any other person would have had in case such reversal had not been decreed in respect of any debts, contracts, or acts of the wife incurred, entered into, or done between the times of the sentence of separation and of the reversal thereof.

Decree of separation obtained during the absence of husband or wife may be reversed.

See also Mat. C. Act, 1858, s. 8.

24. In all cases in which the Court shall make any decree or order for alimony, it may direct the same to be paid either to the wife herself or to any trustee on her behalf, to be approved by the Court, and may impose any terms or restrictions which to the

Court may direct payment of alimony to wife or to her trustee.

Court may seem expedient, and may from time to time appoint a new trustee, if for any reason it shall appear to the Court expedient so to do.

In case of judicial separation the wife to be considered a feme sole with respect to property she may acquire, &c.
By Mat. C. Act, 1858, s. 7.

25. In every case of a judicial separation the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a feme sole with respect to property of every description which she may acquire, or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a feme sole, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead; provided, that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate.

Also for purposes of contract and suing.

26. In every case of a judicial separation the wife shall, whilst so separated, be considered as a feme sole for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant: Provided, that where upon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use: Provided also, that nothing shall prevent the wife from joining, at any time during such separation, in the exercise of any joint power given to herself and her husband.

On adultery of wife or incest, &c., of husband petition for dissolution of marriage may be presented.

27. It shall be lawful for any husband to present a petition to the said Court, praying that his marriage may be dissolved, on the ground that his wife has since the celebration thereof been guilty of adultery; and it shall be lawful for any wife to present a petition to the said Court, praying that her marriage may be dissolved, on the ground that since the celebration thereof her husband has been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce à mensâ et thoro, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards; and every such petition shall state, as distinctly as the nature of the case permits, the facts on which the claim to have such marriage dissolved is founded: Provided that, for the purposes of this Act, incestuous adultery shall be taken to mean

As to "incestuous adultery."

adultery committed by a husband with a woman with whom, if his wife were dead, he could not lawfully contract marriage by reason of her being within the prohibited degrees of consanguinity or affinity; and bigamy shall be taken to mean marriage of any person, being married, to any other person during the life of the former husband or wife, whether the second marriage shall have taken place within the dominions of Her Majesty or elsewhere.

28. Upon any such petition presented by a husband, the petitioner shall make the alleged adulterer a co-respondent to the petition, unless on special grounds, to be allowed by the Court, he shall be excused from so doing; and on every petition presented by a wife for dissolution of marriage, the Court, if it see fit, may direct that the person with whom the husband is alleged to have committed adultery be made a respondent; and the parties, or either of them, may insist on having the contested matters of fact tried by a jury, as hereinafter mentioned.

Adulterer to be a co-respondent.

May be dismissed from suit, *Mat. C. Act, 1858, s. 11.*

Cause may be tried by a jury if insisted on. Court to be satisfied of absence of collusion, &c.

29. Upon any such petition for the dissolution of a marriage, it shall be the duty of the Court to satisfy itself, so far as it reasonably can, not only as to the facts alleged, but also whether or no the petitioner has been in any manner accessory to or conniving at the adultery, or has condoned the same, and shall also inquire into any counter-charge which may be made against the petitioner.

30. In case the Court, on the evidence in relation to any such petition, shall not be satisfied that the alleged adultery has been committed, or shall find that the petitioner has during the marriage been accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then and in any of the said cases the Court shall dismiss the said petition.

Dismissal of petition in certain cases.

31. In case the Court shall be satisfied on the evidence that the case of the petitioner has been proved, and shall not find that the petitioner has been in any manner accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then the Court shall pronounce a decree declaring such marriage to be dissolved: Provided always, that the Court shall not be bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery, or if the petitioner shall, in the opinion of the Court, have been guilty of unreason-

Power to Court to pronounce decree for dissolving marriage.

Now only a decree nisi in the first instance.

See *Mat. C. Act, 1860, s. 7.*

able delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery.

Repealed by
7 Edw. 7,
c. 12.

Husband
may claim
damages from
adulterer.

32. [Maintenance.]

33. Any husband may, either in a petition for dissolution of marriage or for judicial separation, or in a petition limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner; and such petition shall be served on the alleged adulterer and the wife, unless the Court shall dispense with such service, or direct some other service to be substituted: and the claim made by every such petition shall be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations, as actions for criminal conversation are now tried and decided in Courts of Common Law; and all the enactments herein contained with reference to the hearing and decision of petitions to the Court shall, so far as may be necessary, be deemed applicable to the hearing and decision of petitions presented under this enactment; and the damages to be recovered on any such petition shall in all cases be ascertained by the verdict of a jury, although the respondents or either of them may not appear; and after the verdict has been given the Court shall have power to direct in what manner such damages shall be paid or applied, and to direct that the whole or any part thereof shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife.

Power to
Court to
order adul-
terer to pay
costs.

34. Whenever in any petition presented by a husband the alleged adulterer shall have been made a co-respondent, and the adultery shall have been established, it shall be lawful for the Court to order the adulterer to pay the whole or any part of the costs of the proceedings.

Power to
Court to
make orders
as to custody
of children.

See also Mat.
C. Act, 1859,
s. 4.

35. In any suit or other proceeding for obtaining a judicial separation or a decree of nullity of marriage, and on any petition for dissolving a marriage, the Court may from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree, as it may deem just and proper with respect to the custody, maintenance, and education of the children, the marriage of whose parents is the subject of such suit or other proceeding, and may, if it shall think fit,

direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery.

36. In questions of fact arising in proceedings under this Act it shall be lawful for, but, except as hereinbefore provided, not obligatory upon, the Court to direct the truth thereof to be determined before itself or before any one or more of the judges of the said Court, by the verdict of a special or common jury.

Questions of fact may be tried before the Court by a jury.

37. The Court, or any judge thereof, may make all such rules and orders upon the sheriff or any other person for procuring the attendance of a special or common jury for the trial of such question as may now be made by any of the Superior Courts of Common Law at Westminster, and may also make any other orders which to such Court or judge may seem requisite; and every such jury shall consist of persons possessing the like qualifications, and shall be struck, summoned, balloted for, and called in like manner as if such jury were a jury for the trial of any cause in any of the said Superior Courts; and every jurymen so summoned shall be entitled to the same rights, and subject to the same duties and liabilities, as if he had been duly summoned for the trial of any such cause in any of the said Superior Courts; and every party to any such proceeding shall be entitled to the same rights as to challenge and otherwise as if he were a party to any such cause.

Where a question is ordered to be tried a jury may be summoned as in the Common Law Courts.

Rights to challenge.

38. When any such question shall be so ordered to be tried, such question shall be reduced into writing in such form as the Court shall direct, and at the trial the jury shall be sworn to try the said question, and a true verdict to give thereon according to the evidence; and upon every such trial the Court or judge shall have the same powers, jurisdiction, and authority, as any judge of any of the said Superior Courts sitting at Nisi Prius.

Such question to be reduced into writing, and a jury to be sworn to try it.

Judge to have same powers as at Nisi Prius.

39. Upon the trial of any such question or of any issue under this Act a bill of exceptions may be tendered, and a general or special verdict or verdicts, subject to a special case, may be returned, in like manner as in any cause tried in any of the said Superior Courts; and every such bill of exceptions, special verdict, and special case respectively shall be stated, settled, and sealed in like manner as in any cause tried in any of the said Superior Courts, and where the trial shall not have been had in the Court for Divorce and Matrimonial Causes, shall be returned into such Court without any writ of error or other writ; and the matter of law in every such bill of exceptions, special verdict, and special case shall be heard and determined by the

Bill of exceptions, special verdict, and special case.

full Courts, subject to such right of appeal as is hereinafter given in other cases.

Court may direct issues to try any fact.

40. It shall be lawful for the Court to direct one or more issue or issues to be tried in any Court of Common Law, and either before a judge of assize in any county or at the sittings for the trial of causes in London or Middlesex, and either by a special or common jury, in like manner as is now done by the Court of Chancery.

Affidavit in support of a petition.

41. Every person seeking a decree of nullity of marriage, or a decree of judicial separation, or a dissolution of marriage, or decree in a suit of jactitation of marriage, shall, together with the petition or other application for the same, file an affidavit verifying the same so far as he or she is able to do so, and stating that there is not any collusion or connivance between the deponent and the other party to the marriage.

Service of petition.

42. Every such petition shall be served on the party to be affected thereby, either within or without Her Majesty's dominions, in such manner as the Court shall by any general or special order from time to time direct; and for that purpose the Court shall have all the powers conferred by any statute on the Court of Chancery: Provided always, that the said Court may dispense with such service altogether in case it shall seem necessary or expedient so to do.

Examination of petitioner. Parties are now made witnesses for all purposes by Evidence Amendment Act, 1869 (32 & 33 Vict. c. 68).

43. The Court may, if it shall think fit, order the attendance of the petitioner, and may examine him or her, or permit him or her to be examined or cross-examined on oath on the hearing of any petition; but no such petitioner shall be bound to answer any question tending to show that he or she has been guilty of adultery.

Adjournment.

44. The Court may from time to time adjourn the hearing of any such petition, and may require further evidence thereon, if it shall see fit so to do.

Court may order settlement of property for benefit of innocent party and children of marriage.

45. In any case in which the Court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made appear to the Court that the wife is entitled to any property either in possession or reversion, it shall be lawful for the Court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property or any part thereof, for the benefit of the innocent party, and of the children of the marriage, or either or any of them.

See Mat. C. Act, 1859, s. 5, and Mat. C. Act, 1860, s. 6. Mode of

46. Subject to such rules and regulations as may be established as herein provided, the witnesses in all proceedings before the Court where their attendance can be had, shall be sworn and examined orally in open Court: provided that parties, except

as hereinbefore provided, shall be at liberty to verify their respective cases in whole or in part by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party or by direction of the Court, be subject to be cross-examined by or on behalf of the opposite party orally in open Court, and after such cross-examination may be re-examined orally in open Court as aforesaid by or on behalf of the party by whom such affidavit was filed.

47. [Court may issue commissions or give orders for examination of witnesses who are abroad or unable to attend.] taking evidence.
Repealed by 55 & 56 Vict. c. 19.

48. [Rules of evidence in Common Law Courts to be observed.] Ibid.

49. The Court may, under its seal, issue writs of subpœna or subpœna duces tecum, commanding the attendance of witnesses at such time and place as shall be therein expressed: and such writs may be served in any part of Great Britain or Ireland; and every person served with such writ shall be bound to attend and to be sworn and give evidence in obedience thereto, in the same manner as if it had been a writ of subpœna or subpœna duces tecum issued from any of the said Superior Courts of Common Law in a cause pending therein, and served in Great Britain or Ireland, as the case may be: [Provision as to witnesses affirming or declaring under Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125).] Attendance of witnesses on the Court.
Repealed by 55 & 56 Vict. c. 19.

50. All persons wilfully deposing or affirming falsely in any proceeding before the Court shall be deemed to be guilty of perjury, and shall be liable to all the pains and penalties attached thereto. Penalties for false evidence.

51. [Costs.] Repealed by 55 & 56 Vict. c. 19.

52. [Enforcement of orders and decrees.] Ibid.

53. The Court shall make such rules and regulations concerning the practice and procedure under this Act, as it may from time to time consider expedient, and shall have full power from time to time to revoke or alter the same. Power to make rules, &c. for procedure and to alter them from time to time.

54. [Fees to be regulated.] The said Court may make such rules and regulations as it may deem necessary and expedient for enabling persons to sue in the said Court in formâ pauperis. Repealed by 55 & 56 Vict. c. 19.
Suing in formâ pauperis.

55. Either party dissatisfied with any decision of the Court in any matter which, according to the provisions aforesaid, may be made by the Judge Ordinary alone, may, within three calendar months after the pronouncing thereof, appeal therefrom to the full Court, *whose decision shall be final*. The words "whose decision shall be final," repealed by 55 & 56 Vict. c. 19.

56. [Appeal to the House of Lords in case of petition for dissolution of marriage.] Repealed by 31 & 32 Vict. c. 77, s. 2.

Liberty to parties to marry again.

See Mat. C. Act, 1868, s. 4.

No clergyman compelled to solemnize certain marriages.

If minister of any church, &c., refuses to perform marriage ceremony, any other minister may perform such service.

Repealed by 55 & 56 Vict. c. 19. Ibid.

Ibid.

Repealed by 55 & 56 Vict. c. 19; also by 42 & 43 Vict. c. 78.

Repealed by 55 & 56 Vict. c. 19. Ibid.

Ibid.

Power to Secretary of State to order all letters patent, records, &c., to be transmitted from all Ecclesiastical Courts.

57. When the time hereby limited for appealing against any decree dissolving a marriage shall have expired, and no appeal shall have been presented against such decree, or when any such appeal shall have been dismissed, or when in the result of any appeal any marriage shall be declared to be dissolved, but not sooner, it shall be lawful for the respective parties thereto to marry again, as if the prior marriage had been dissolved by death: Provided always, that no clergyman, in holy orders of the United Church of England and Ireland, shall be compelled to solemnize the marriage of any person whose former marriage may have been dissolved on the ground of his or her adultery, or shall be liable to any suit, penalty, or censure for solemnizing or refusing to solemnize the marriage of any such person.

58. Provided always, that when any minister of any church or chapel of the United Church of England and Ireland shall refuse to perform such marriage service between any persons who but for such refusal would be entitled to have the same service performed in such church or chapel, such minister shall permit any other minister in holy orders of the said united church, entitled to officiate within the diocese in which such church or chapel is situate, to perform such marriage service in such church or chapel.

59. [No action in England for criminal conversation.]

60. [All fees, except as herein provided, to be collected by stamps, &c.]

61. [Provisions of 20 & 21 Vict. c. 77, concerning stamps for the Court of Probate to be applicable to the purposes of this Act.]

62. [Expenses of the Court to be paid out of monies to be provided by Parliament.]

63. [Annual certificates of proctors, &c.]

64. [Compensation to proctors.]

65. [Salary of judge of Court of Probate.]

66. Any one of Her Majesty's Principal Secretaries of State may order every judge, registrar, or other officer of any Ecclesiastical Court in England or the Isle of Man, or any other person having the public custody of or control over any letters patent, records, deeds, processes, acts, proceedings, books, documents or other instrument relating to marriages, or to suits for divorce, nullity of marriage, restitution of conjugal rights, or to any other matters or causes matrimonial, except marriage licences, to transmit the same, at such times and in such manner, to such places

in London or Westminster, and under such regulations as the said Secretary of State may appoint; and if any judge, registrar, officer, or other person shall wilfully disobey such order, he shall for the first offence forfeit the sum of one hundred pounds, to be recoverable by any registrar of the Court of Probate as a debt under this Act in any of the Superior Courts at Westminster, and for the second and subsequent offences the Judge Ordinary may commit the person so offending to prison for any period not exceeding three calendar months, provided that the warrant of committal be countersigned by one of Her Majesty's Principal Secretaries of State, and the said persons so offending shall forfeit all claim to compensation under this Act.

Penalty on disobeying such order.

67. All rules and regulations concerning practice or procedure, *or fixing or regulating fees*, which may be made by the Court under this Act, shall be laid before both Houses of Parliament within one month after the making thereof, if Parliament be then sitting, or if Parliament be not then sitting, within one month after the commencement of the then next session of Parliament.

Rules, &c., to be laid before Parliament.

Words "or fixing or regulating fees," repealed by 55 & 56 Vict. c. 19.

68. [Yearly account of fees, &c., to be laid before Parliament.] Repealed by 42 & 43 Vict. c. 78.

21 & 22 VICT. C. 108 (MATRIMONIAL CAUSES ACT, 1858) (c).

An Act to amend the Act of the Twentieth and Twenty-first Victoria, chapter Eighty-five. [2nd August, 1858.]

1. [Judge Ordinary of the Divorce Court may sit in chambers.] Repealed 55 & 56 Vict. c. 19.

2. [Treasury to cause chambers to be provided.] Ibid.

3. [Powers of judge when sitting in chambers.] Ibid.

4. The registrars of the principal registry of the Court of Probate shall be invested with and shall and may exercise with reference to proceedings in the Court for Divorce and Matrimonial Causes the same power and authority which surrogates of the official principal of the Court of Arches could or might, before the passing of the twentieth and twenty-first Victoria, chapter seventy-seven, have exercised in chambers with reference to proceedings in that Court.

The registrars to do all acts heretofore done by surrogates.

(c) Short title, "Matrimonial Causes Act, 1858"; collective title, "Matrimonial Causes Acts, 1857 to 1878" (59 & 60 Vict. c. 14).

This section is now of little practical value, unless possibly in a petition under the Legitimacy Declaration Act, 1858.

Wives deserted by their husbands may apply to the judge for an order to protect property, &c., acquired by them.

Provisions respecting property of wife to extend to property vested in her as executrix, &c.

Order for protection of earnings, &c. of wife to be deemed valid, until reversed, &c.

5. In every cause in which a sentence of divorce and separation from bed, board, and mutual cohabitation has been given by a competent Ecclesiastical Court before the Act of the twentieth and twenty-first Victoria, chapter eighty-five, came into operation, the evidence in the case in which such sentence was pronounced in such Ecclesiastical Court may, whenever from the death of a witness or from any other cause it may appear to the Court reasonable and proper, be received on the hearing of any petition which may be presented to the said Court for Divorce and Matrimonial Causes.

6. Every wife deserted by her husband, wheresoever resident in England, may, at any time after such desertion, apply to the said Judge Ordinary for an order to protect any money or property in England she may have acquired or may acquire by her own lawful industry, and any property she may have become possessed of, or may become possessed of after such desertion, against her husband and his creditors, and any person claiming under him; and the Judge Ordinary shall exercise in respect of every such application all the powers conferred upon the Court for Divorce and Matrimonial Causes under the twentieth and twenty-first Victoria, chapter eighty-five, section twenty-one.

7. The provisions contained in this Act, and in the said Act of the twentieth and twenty-first Victoria, chapter eighty-five, respecting the property of a wife who has obtained a decree for judicial separation or an order for protection, shall be deemed to extend to property to which such wife has become, or shall become entitled as executrix, administratrix, or trustee, since the sentence of separation or the commencement of the desertion (as the case may be); and the death of the testator or intestate shall be deemed to be the time when such wife became entitled as executrix or administratrix.

8. In every case in which a wife shall under this Act, or under the said Act of the twentieth and twenty-first Victoria, chapter eighty-five, have obtained an order to protect her earnings or property, or a decree for judicial separation, such order or decree shall, until reversed or discharged, so far as necessary for the protection of any person or corporation who shall deal with the wife, be deemed valid and effectual; and no discharge, variation, or reversal of such order or decree shall prejudice or affect any rights or remedies which any person would have had in case the same had not been so reversed, varied, or discharged, in respect of any debts, contracts, or acts of the wife incurred, entered into, or done between the times of the making such order or decree,

and of the discharge, variation, or reversal thereof; and property of or to which the wife is possessed or entitled for an estate in remainder or reversion at the date of the desertion or decree (as the case may be) shall be deemed to be included in the protection given by the order or decree.

9. Every order which shall be obtained by a wife under the said Act of the twentieth and twenty-first Victoria, chapter eighty-five, or under this Act, for the protection of her earnings or property, shall state the time at which the desertion in consequence whereof the order is made commenced; and the order shall, as regards all persons dealing with such wife in reliance thereon, be conclusive as to the time when such desertion commenced.

Order to state the time at which the desertion commenced.

10. All persons and corporations who shall, in reliance on any such order or decree as aforesaid, make any payment to, or permit any transfer or act to be made or done by, the wife who has obtained the same, shall, notwithstanding such order or decree may then have been discharged, reversed, or varied, or the separation of the wife from her husband may have ceased, or at some time since the making of the order or decree been discontinued, be protected and indemnified in the same way in all respects as if, at the time of such payment, transfer, or other act, such order or decree were valid and still subsisting without variation in full force and effect, and the separation of the wife from her husband had not ceased or been discontinued, unless at the time of such payment, transfer, or other act, such persons or corporations had notice of the discharge, reversal or variation of such order or decree, or the cessation or discontinuance of such separation.

Indemnity to persons, &c., making payments under orders afterwards reversed.

11. In all cases now pending, or hereafter to be commenced, in which, on the petition of a husband for a divorce, the alleged adulterer is made a co-respondent, or in which, on the petition of a wife, the person with whom the husband is alleged to have committed adultery is made a respondent, it shall be lawful for the Court, after the close of the evidence on the part of the petitioner, to direct such co-respondent or respondent to be dismissed from the suit, if it shall think there is not sufficient evidence against him or her.

Where alleged adulterer a co-respondent, Court may order him to be dismissed from the suit.

12. [Persons who administer oaths under 20 & 21 Vict. c. 77, to administer under 20 & 21 Vict. c. 85.]

Repealed by 55 & 56 Vict. c. 19.

13. The bill of any proctor, attorney, or solicitor, for any fees, charges, or disbursements in respect of any business transacted in the Court for Divorce and Matrimonial Causes, and whether

Bills of proctors, attornies, &c., to be subject to taxation.

the same was transacted before the full Court or before the Judge Ordinary, shall, as well between proctor or attorney, or solicitor and client, as between party and party, be subject to taxation by any one of the registrars belonging to the principal registry of the Court of Probate; and the mode in which any such bill shall be referred for taxation, and by whom the costs of the taxation shall be paid, shall be regulated by the rules and orders to be made under the Act of the twentieth and twenty-first of Victoria, chapter eighty-five; and the certificate of the registrar of the amount at which such bill is taxed shall be subject to appeal to the judge of the said Court.

Power to enforce decree as to costs.

14. The Judge Ordinary of the Court for Divorce and Matrimonial Causes, and the registrars of the principal registry of the Court of Probate, shall respectively, in any case where an Ecclesiastical Court having matrimonial jurisdiction had, previously to the commencement of the Act of the twentieth and twenty-first Victoria, chapter eighty-five, made any order or decree in respect of costs, have the same power of taxing such costs, and enforcing payment thereof, or of otherwise carrying such order or decree into effect, as if the cause wherein such decree was made had been originally commenced and prosecuted in the said Court for Divorce and Matrimonial Causes: Provided, that in taxing any such costs, or any other costs incurred in causes depending in any Ecclesiastical Court previously to the commencement of the said recited Act, all fees, charges, and expenses shall be allowed which might have been legally made, charged and enforced according to the practice of the Court of Arches.

Judge to have authority over proctors, &c.

15. The Judge Ordinary of the Court for Divorce and Matrimonial Causes shall have and exercise, over proctors, solicitors, and attornies practising in the said Court, the like authority and control as is now exercised by the judges of any Court of equity or of common law over persons practising therein as proctors, solicitors, or attornies.

Repealed by 55 & 56 Vict. c. 19.

16. [Commissioners may be appointed in the Isle of Man, &c., to administer oaths.]

17. [*Repealed by Matrimonial Causes Act, 1868, s. 2.*]

Ibid.

18. [Judge Ordinary may grant rule nisi for new trial, &c.]

So much of Mat. C. Act, 1857, as to applications to judges of assize repealed.

19. So much of the Act of the twentieth and twenty-first Victoria, chapter eighty-five, as authorizes application to be made for restitution of conjugal rights, or for judicial separation by petition to any judge of assize, and as relates to the proceedings on such petition, shall be and the same is hereby repealed.

20. [Affidavits before whom to be sworn when parties making them reside in foreign parts.] Repealed by 52 Vict. c. 10.
21. [Affidavits before whom to be sworn in Her Majesty's dominions out of England.] Ibid.
22. [Persons forging seals or signatures, &c., guilty of felony.] Ibid.
23. [Persons taking a false oath before a surrogate, &c., guilty of perjury.] Ibid.

22 & 23 VICT. c. 61 (MATRIMONIAL CAUSES ACT, 1859) (*d*).

An Act to make further provision concerning the Court for Divorce and Matrimonial Causes.

[13th August, 1859.]

1. [Judges of the Queen's Bench, &c., to be judges of the Court.] Repealed by 55 & 56 Vict. c. 19.
2. [*Repealed by 23 & 24 Vict. c. 144, s. 4, and 55 & 56 Vict. c. 19.*]
3. [Precedence of the Judge Ordinary.] Ibid.
4. The Court, after a final decree of judicial separation, nullity of marriage, or dissolution of marriage, may upon application (by petition) for this purpose make, from time to time, all such orders and provision with respect to the custody, maintenance, and education of the children, the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the Court of Chancery, as might have been made by such final decree or by interim orders in case the proceedings for obtaining such decree were still pending; and all orders under this enactment may be made by the Judge Ordinary alone or with one or more of the other judges of the Court. The Court may make orders as to custody, &c. of children after a final decree of separation, &c. Mat. C. Act, 1857, s. 35.
5. The Court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of antenuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit. As to marriage settlements of parties after final decree of nullity of marriage. See now Mat. C. Act, 1878.

(*d*) Short title, "The Matrimonial Causes Act, 1859"; collective title, "The Matrimonial Causes Acts, 1857 to 1878," given by 59 & 60 Vict. c. 14.

See Evidence
Amendment
Act, 1869
(32 & 33 Vict.
c. 68).

6. On any petition presented by a wife praying that her marriage may be dissolved by reason of her husband having been guilty of adultery coupled with cruelty, or of adultery coupled with desertion, the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion.

Repealed
55 & 56 Vict.
c. 19.

7. [Extension of right to appeal to House of Lords.]

23 & 24 VICT. c. 144 (MATRIMONIAL CAUSES ACT,
1860) (e).

*An Act to amend the Procedure and Powers of the Court
for Divorce and Matrimonial Causes.*

[28th August, 1860.]

Repealed by
55 & 56 Vict.
c. 19.

1. [Judge Ordinary may exercise powers now vested in the full Court, and may call in the assistance of one other judge.]

Ibid.

2. [Judge Ordinary may direct any matter to be heard by the full Court. Appeal to full Court.]

3. [*Repealed by the Matrimonial Causes Act, 1868, s. 2.*]

Ibid.

4. [Sittings of the full Court.]

Court may,
where one
party only
appears,
require
counsel to be
appointed to
argue on the
other side.

5. In every case of a petition for a dissolution of marriage it shall be lawful for the Court, if it shall see fit, to direct all necessary papers in the matter to be sent to Her Majesty's proctor, who shall, under the directions of the Attorney-General, instruct counsel to argue before the Court any question in relation to such matter, and which the Court may deem it necessary or expedient to have fully argued; and Her Majesty's proctor shall be entitled to charge and be reimbursed the costs of such proceeding as part of the expense of his office.

Repealed as
far as the
words "fur-
ther enacted
that," 55 &
56 Vict. c. 19.

6. *And whereas by section forty-five of the Act of the session holden in the twentieth and twenty-first years of her Majesty, chapter eighty-five, it was enacted that "In any case in which the Court should pronounce a sentence of divorce or judicial separation for adultery of the wife, if it should be made appear to the Court that the wife was entitled to any property, either in possession or reversion, it should be lawful for the Court, if it*

(e) Short title, "The Matrimonial Causes Act, 1860"; collective title, "The Matrimonial Causes Acts, 1857 to 1878," 59 & 60 Vict. c. 14.

should think proper, to order such settlement as it should think reasonable to be made of such property, or any part thereof, for the benefit of the innocent party and of the children of the marriage, or either of them": Be it further enacted, that any instrument executed pursuant to any order of the Court made under the said enactment before or after the passing of this Act, at the time of or after the pronouncing of a final decree of divorce or judicial separation, shall be deemed valid and effectual in the law, notwithstanding the existence of the disability of coverture at the time of the execution thereof.

Instruments executed pursuant to orders under recited enactment to be valid notwithstanding coverture.

7. Every decree for a divorce shall in the first instance be a decree nisi, not to be made absolute till after the expiration of such time, not less than *three months (f)* from the pronouncing thereof, as the Court shall by general or special order from time to time direct; and during that period any person shall be at liberty, in such manner as the Court shall by general or special order in that behalf from time to time direct, to show cause why the said decree should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not brought before the Court; and, on cause being so shown, the Court shall deal with the case by making the decree absolute, or by reversing the decree nisi, or by requiring further inquiry, or otherwise as justice may require; and at any time during the progress of the cause or before the decree is made absolute any person may give information to Her Majesty's Proctor of any matter material to the due decision of the case, who may thereupon take such steps as the Attorney-General may deem necessary or expedient; and if from any such information or otherwise the said Proctor shall suspect that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case, he may, under the direction of the Attorney-General, and by leave of the Court, intervene in the suit, alleging such case of collusion, and retain counsel and subpœna witnesses to prove it; and it shall be lawful for the Court to order the costs of such counsel and witnesses, and otherwise, arising from such intervention, to be paid by the parties or such of them as it shall see fit, including a wife if she have separate property; and in case the said proctor shall not thereby be fully satisfied his reasonable costs, he shall be entitled to charge and be reimbursed the difference as part of the expense of his office.

Decrees.

Collusion.

Extended to suits for nullity by Mat. C. Act, 1873, s. 1.

(f) Now six months; see Matrimonial Causes Act, 1866, s. 3.

Continuance
of Act.

8. This Act shall continue in force until the thirty-first day of July, one thousand eight hundred and sixty-two, and no longer. This section is repealed, and the above statute made perpetual by 25 & 26 Vict. c. 81, a statute passed solely for that purpose, and consisting of a single section.

27 & 28 VICT. c. 44.

An Act to amend the Act relating to Divorce and Matrimonial Causes in England, Twentieth and Twenty-first Victoria, Chapter Eighty-five (g).

[14th July, 1864.]

Amending
provisions of
Mat. C. Act,
1857, s. 21, as
to discharge
of orders for
protection of
property of
wives deserted
by their
husbands.

1. Where under the provisions of section twenty-one of the said Act a wife deserted by her husband shall have obtained or shall hereafter obtain an order protecting her earnings and property, from a police magistrate, or justices in petty sessions, or the Court for Divorce and Matrimonial Causes, as the case may be, the husband, and any creditor or other person claiming under him, may apply to the Court, or to the magistrate or justices by whom such order was made for the discharge thereof, as by the said Act authorized; and in case the said order shall have been made by a police magistrate, and the said magistrate shall have died or been removed, or have become incapable of acting, then in every such case the husband or creditor, or such other person as aforesaid, may apply to the magistrate for the time being acting as the successor or in the place of the magistrate who made the order of protection, for the discharge of it, who shall have authority to make an order discharging the same; and an order for discharge of an order for protection may be applied for to and be granted by the Court, although the order for protection was not made by the Court, and an order for protection made at one petty sessions may be discharged by the justices of any later petty sessions, or by the Court.

(g) Short title, "The Matrimonial Causes Act, 1866"; collective title, "The Matrimonial Causes Acts, 1857 to 1878," 59 & 60 Vict. c. 14.

29 & 30 VICT. C. 32 (MATRIMONIAL CAUSES ACT, 1866) (*h*).

An Act further to amend the Procedure and Powers of the Court for Divorce and Matrimonial Causes.

[11th June, 1866.]

WHEREAS by the Act passed in the session of Parliament holden in the twentieth and twenty-first years of the reign of Her present Majesty, intituled "An Act to amend the Laws relating to Divorce and Matrimonial Causes in England," it is by the thirty-second section enacted, that "the Court may, on pronouncing any decree for a dissolution of marriage, order that the husband shall to the satisfaction of the Court secure to the wife such gross or annual sum of money as to the Court may seem reasonable, and for that purpose may refer it to one of the conveying counsel of the Court of Chancery to settle and approve of a proper deed to be executed by all necessary parties":

Mat. C. Act,
1857, s. 32.

And whereas it sometimes happens that a decree for a dissolution of marriage is obtained against a husband who has no property on which the payment of any such gross or annual sum can be secured, but nevertheless he would be able to make a monthly or weekly payment to the wife during their joint lives:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

1. [Power to order monthly or weekly payments to wife from husband on dissolution of marriage.]

2. In any suit instituted for dissolution of marriage, if the respondent shall oppose the relief sought on the ground, in case of such a suit instituted by a husband, of his adultery, cruelty, or desertion, or, in case of such a suit instituted by a wife, on the ground of her adultery or cruelty, the Court may in such suit give to the respondent, on his or her application, the same relief to which he or she would have been entitled in case he or she had filed a petition seeking such relief.

Repealed by
7 Edw. 7,
c. 12.

Relief to
respondent.

3. No decree nisi for a divorce shall be made absolute until after the expiration of six calendar months from the pronouncing thereof, unless the Court shall under the power now vested in it fix a shorter time.

Decree nisi not
absolute till
after six months.
Extended to
decrees for
nullity by
Mat. C. Act,
1873, s. 1.

(*h*) Short title, "The Matrimonial Causes Act, 1866"; collective title, "The Matrimonial Causes Acts, 1857 to 1878," 59 & 60 Vict. c. 14.

31 & 32 VICT. c. 77 (MATRIMONIAL CAUSES ACT, 1868) (i).

An Act to amend the Law relating to Appeals from the Court of Divorce and Matrimonial Causes in England.

[31st July, 1868.]

WHEREAS it is expedient to amend the law relating to appeals from the Court for Divorce and Matrimonial Causes with a view to prevent unnecessary delay in the final determination of suits for dissolution or nullity of marriage:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

Interpreta-
tion.

Sect. 56 of
Mat. C. Act,
1857, sect. 17
of Mat. C.
Act, 1858,
and sect. 3
of Mat. C.
Act, 1860,
repealed.

Appeals to
House of
Lords to be
within one
month.

No appeal in
undefended
suits for
dissolution
unless by
leave of
Court.

Liberty to
parties to
marry again.
Mat. C. Act,
1857, s. 57.

1. Throughout this Act the expression "the Court" shall mean the Court for Divorce and Matrimonial Causes.

2. Section fifty-six of the Act of twentieth and twenty-first Victoria, chapter eighty-five, section seventeen of the Act of twenty-first and twenty-second Victoria, chapter one hundred and eight, and section three of the Act of twenty-third and twenty-fourth Victoria, chapter one hundred and forty-four, are hereby repealed.

3. Either party dissatisfied with the final decision of the Court on any petition for dissolution or nullity of marriage may, within one calendar month after the pronouncing thereof, appeal therefrom to the House of Lords, and on the hearing of any such appeal the House of Lords may either dismiss the appeal or reverse the decree, or remit the case to be dealt with in all respects as the House of Lords shall direct: Provided always, that in suits for dissolution of marriage no respondent or co-respondent, not appearing and defending the suit on the occasion of the decree nisi being made, shall have any right of appeal to the House of Lords against the decree when made absolute, unless the Court, upon application made at the time of the pronouncing of the decree absolute, shall see fit to permit an appeal.

4. Section fifty-seven of the said Act of twenty-first Victoria, chapter eighty-five, shall be read and construed with reference to the time for appealing as varied by this Act; and in cases where under this Act there shall be no right of appeal, the parties

(i) Short title, "The Divorce Amendment Act, 1868"; collective title, "The Matrimonial Causes Acts, 1857 to 1878," 59 & 60 Vict. c. 14.

respectively shall be at liberty to marry at any time after the pronouncing of the decree absolute.

5. This Act may be cited as "The Divorce Amendment Act, Short title. 1868."

6. This Act shall extend to all suits pending at the time when the same shall come into operation, notwithstanding that a decree may have been pronounced therein; provided, nevertheless, that this Act shall not affect any pending appeal, nor shall the same prejudice any subsisting right of appeal against a decree already pronounced, provided such appeal be lodged within one calendar month after this Act shall come into operation.

Qualified
retrospective
operation.

36 & 37 VICT. C. 31 (MATRIMONIAL CAUSES ACT, 1873) (*k*).

An Act to extend to suits for Nullity of Marriage the Law with respect to the Intervention of Her Majesty's Proctor and others in Suits in England for dissolving Marriages.
[16th June, 1873.]

[Preamble.]

1. The above-mentioned sections of the said Act shall extend to decrees and suits for nullity of marriage in like manner as they apply to decrees and suits for divorce, and shall be construed as if they were herein enacted, with the substitution of the words "a decree for nullity of marriage" for the words "decree for a divorce" or "divorce," as the case may require.

Repealed by 56
& 57 Vict. c. 54.

Extension of
sect. 7 of Mat. C.
Act, 1860, and
sect. 3 of Mat.
C. Act, 1866, to
suits for nullity
of marriage.

2. This Act, together with the Acts specified in the schedule to this Act may be cited as "The Matrimonial Causes Acts, 1857 to 1873," and each Act may be cited as the Matrimonial Causes Act, of the year in which it was passed.

Short title.

The words
"together with,"
to "and each
Act" repealed
by 56 & 57 Vict.
c. 54.

SCHEDULE.

MATRIMONIAL CAUSES ACTS.

Repealed by 56
& 57 Vict. c. 54.

(*k*) Short title, "The Matrimonial Causes Act, 1873"; collective title, "The Matrimonial Causes Acts, 1857 to 1873," 59 & 60 Vict. c. 14.

41 & 42 VICT. C. 19 (MATRIMONIAL CAUSES ACT, 1878) (*l*).*An Act to amend the Matrimonial Causes Acts.*

[27th May, 1878.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

Short title.

1. This Act may be cited as the Matrimonial Causes Act, 1878.

Costs of intervention.

2. Where the Queen's proctor or any other person shall intervene or show cause against a decree nisi in any suit or proceeding for divorce or for nullity of marriage, the Court may make such order as to the costs of the Queen's proctor, or of any other person who shall intervene or show cause as aforesaid, or of all and every party or parties thereto, occasioned by such intervention or showing cause as aforesaid, as may seem just; and the Queen's proctor, any other person as aforesaid, and such party or parties shall be entitled to recover such costs in like manner as in other cases: Provided that the Treasury may, if it shall think fit, order any costs which the Queen's proctor shall, by any order of the Court made under this section, pay to the said party or parties, to be deemed to be part of the expenses of his office.

Extension of power given by Mat. C. Act, 1859.

3. The Court may exercise the powers vested in it by the provisions of section five of the Act of the twenty-second and twenty-third years of Victoria, chapter sixty-one, notwithstanding that there are no children of the marriage.

Repealed by 58 & 59 Vict. c. 39.

4. [If husband convicted of aggravated assault, the Court may order that wife be not bound to cohabit, &c.]

47 & 48 VICT. C. 68 (MATRIMONIAL CAUSES ACT, 1884).

An Act to amend the Matrimonial Causes Acts.

[14th August, 1884.]

See ante, Chap. IV., pp. 84—86.

(*l*) Short title, "The Matrimonial Causes Act, 1878"; collective title, "The Matrimonial Causes Acts, 1857 to 1878," 59 & 60 Vict. c. 14.

7 EDW. 7, C. 12 (MATRIMONIAL CAUSES ACT, 1907).

An Act to amend the Matrimonial Causes Acts, 1857 and 1866, by extending the Powers of the Court in relation to Maintenance and Alimony, and leave to intervene.

[9th August, 1907.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1.—(1) The court may, if it thinks fit, on any decree for dissolution or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to his wife such gross sum of money or such annual sum of money for any term not exceeding her life as, having regard to her fortune, (if any), to the ability of the husband, and to the conduct of the parties, it may deem reasonable, and for that purpose may refer the matter to any one of the conveyancing counsel of the court to settle and approve of a proper deed or instrument to be executed by all necessary parties, and the court may, if it thinks fit, suspend the pronouncing of its decree until such deed shall have been duly executed.

Power to grant maintenance and alimony.

(2) In any such case the court may, if it thinks fit, make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sum for her maintenance and support as the court may think reasonable, and any such order may be made either in addition to or instead of an order under the last preceding subsection.

Provided that—

(a) If the husband afterwards from any cause becomes unable to make such payments it shall be lawful for the court to discharge or modify the order or temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the order wholly or in part as the court may think fit; and

(b) Where the court has made any such order as is mentioned in this sub-section, and the court is satisfied that the means of the husband have increased, the court may, if it thinks fit, increase the amount payable under the order.

(3) Upon any petition for dissolution or nullity of marriage, the court shall have the same power to make interim orders for payment of money, by way of alimony or otherwise, to the wife, as it has in a suit instituted for judicial separation.

Repeal of
sect. 32 of
20 & 21 Vict.
c. 85, and
sect. 1 of
29 & 30 Vict.
c. 32.

2. Section thirty-two of the Matrimonial Causes Act, 1857, and section one of the Matrimonial Causes Act, 1866, are hereby repealed.

Power to
allow
intervention
on terms.

3. In every case, not already provided for by law, in which any person is charged with adultery with any party to a suit, or in which the court may consider, in the interest of any person not already a party to the suit, that such person should be made a party to the suit, the court may, if it thinks fit, allow that person to intervene upon such terms (if any) as the court may think just.

Short title.

4. This Act may be cited as the Matrimonial Causes Act, 1907, and may be cited with the Matrimonial Causes Acts, 1857 to 1878.

APPENDIX C.

STATUTES MISCELLANEOUS.

8 & 9 VICT. c. 113, s. 1.

An Act to facilitate the Admission in Evidence of certain official and other Documents. [8th August, 1845.]

WHEREAS it is provided by many statutes that various certificates, official and public documents, documents and proceedings of corporations and of joint stock and other companies, and certified copies of documents, bye laws, entries in registers and other books, shall be receivable in evidence of certain particulars in courts of justice, provided they be respectively authenticated in the manner prescribed by such statutes: And whereas the beneficial effect of these provisions has been found by experience to be greatly diminished by the difficulty of proving that the said documents are genuine; and it is expedient to facilitate the admission in evidence of such and the like documents: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that whenever by any Act now in force or hereafter to be in force any certificate, official or public document, or document or proceeding of any corporation or joint stock or other company, or any certified copy of any document, bye law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either House of Parliament, or any committee of either House, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof in every case in which the original record could have been received in evidence.

Certain documents to be received in evidence without proof of seal or signature, &c. of person signing the same.

14 & 15 VICT. c. 40, ss. 1, 12, 21 AND 22.

An Act for Marriages in India.

[24th July, 1851.]

Marriage of
Christians in
India may be
solemnized
under this
Act.

Notice of
intended
marriage to
be given to
the marriage
registrar for
the district.

Certificates
of marriages
to be
transmitted
periodically to
the secretary
of the Govern-
ment, &c.

Marriages
may continue
to be
solemnized as
heretofore.

I. In every case of marriage intended to be solemnized in India after the commencement of this Act, where one or both of the parties is or are a person or persons professing the Christian religion, such marriage may be solemnized under the provisions of this Act: and where such marriage is intended to be so solemnized, one of the parties shall give notice in writing to the marriage registrar to be appointed under the provisions of this Act for the district within which the parties shall have dwelt for such period then next preceding as by such laws or regulations as herein-after mentioned may be required, or, if the parties dwell in the districts of different marriage registrars shall give the like notice to the marriage registrar for each district; and every such notice shall be in such form and contain such particulars as may be prescribed by such laws or regulations, and shall be open for inspection and published as by such laws or regulations may be provided.

XII. The marriage registrar shall forthwith separate the certificate from the marriage register book, and transmit it, at the end of every month, to the secretary to the government of the presidency or place within which he resides, or to such other officer as may for this purpose be appointed under the laws or regulations herein-after mentioned; and if no marriage have been registered during such month, the marriage registrar shall certify such fact under his hand, and such certificate shall be transmitted as aforesaid; and the marriage registrar shall keep safely the said register book until it be filled, and shall then transmit the same to the secretary to the government, or to such other officer as aforesaid, to be kept by him with the records of his office; provided that with regard to those marriages so certified, of which it may appear to the governor general in council desirable that evidence should be transmitted to England, the secretary to the government, or such other officer as aforesaid, shall, at the end of every three calendar months in each year, send all the certificates of marriage sent to him as aforesaid during such three months, signed by him to the secretary of the East India Company, for the purpose of being delivered to the registrar general of births, deaths, and marriages in England.

XXI. Nothing herein contained shall invalidate or affect any marriage which may be solemnized in India by persons in holy orders, or any marriages which may be solemnized under the

provisions of the Act of the fifty-eighth year of King George the Third, chapter eighty-four, or any other marriages which under the laws for the time being in force in India might have been there solemnized in case this Act had not been passed: provided that it shall be lawful for the governor general of India in council, from time to time by laws and regulations to be made as aforesaid, to provide for the registration of any marriages solemnized in India by persons in holy orders, or of any marriages there solemnized under the provisions of the said Act of the fifty-eighth year of King George the Third, chapter eighty-four, or of any other marriages there solemnized, of which it may appear to the said governor general in council desirable that evidence should be transmitted to England, and to provide for the care and custody of the registers of such marriages, and for the transmission of certificates thereof to the secretaries of the governments of the respective presidencies, or to other officers, and for their sending the same to the secretary of the East India Company, for the purpose of being delivered to the registrar general of births, deaths, and marriages in England, and also to provide for the authentication of such certificates.

Power to governor general in council to make laws for the registration of marriages not solemnized under this Act.

XXII. The certificates which shall be delivered to the registrar general of births, deaths, and marriages in England, under this Act, or under any laws or regulations to be made thereunder, shall be kept in the general register office, in the same manner, and indexes thereof shall be made and searches permitted, and copies thereof, sealed or stamped with the seal of the general register office, shall be given, in the like manner as by the Act of the session holden in the sixth and seventh years of King William the Fourth, chapter eighty-six, is provided concerning the certified copies (kept in such office under the said Act) of the registers of births, deaths, and marriages in England; and every certified copy, purporting to be sealed or stamped with the seal of the said general register office, of any such certificate delivered to the said registrar general under this Act, or under such laws or regulations, shall be received as evidence of the marriage to which the same relates, without further proof of such certificate, or of any entry therein.

Certificates delivered to registrar general under this Act, or under any laws or regulations made thereunder, to be subject to the provisions of 6 & 7 Will. 4, c. 86.

14 & 15 VICT. c. 99, s. 14.

An Act to amend the Law of Evidence. [7th August, 1851.]

Examined
or certified
copies of
documents
admissible in
evidence.

XIV. Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words.

17 & 18 VICT. c. 80, s. 58.

An Act to provide for the better Registration of Births, Deaths, and Marriages in Scotland.

[7th August, 1854.]

Extracts of
entries to be
admissible as
evidence.

LVIII. Every extract of any entry in the register books to be kept under the provisions of this Act, duly authenticated and signed by the registrar general, if such extract shall be from the registers kept at the general registry office, and by the registrar if from any parochial or district register, shall be admissible as evidence in all parts of her Majesty's dominions, without any other or further proof of such entry.

32 & 33 VICT. c. 68 (EVIDENCE FURTHER AMENDMENT Act, 1869) (a).

An Act for the further Amendment of the Law of Evidence.

[9th August, 1869.]

Repealed by 56
& 57 Vict. c. 54.

[Preamble.]

(a) Collective title, "The Evidence Acts, 1806 to 1895," 59 & 60 Vict. c. 14.

1. [Sect. 4 of 14 & 15 Vict. c. 99, and part of sect. 2 of 16 & 17 Vict. c. 83, repealed.] Repealed by 46 & 47 Vict. c. 39.

2. The parties to any action for breach of promise of marriage shall be competent to give evidence in such action: Provided always, that no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise. Parties in actions for breach of promise of marriage.

3. The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding: Provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery. Parties and their husbands and wives to be witnesses in suits for adultery.

4. [Persons objecting to take oath may be allowed to make declaration, and be triable for perjury.] Repealed by 51 & 52 Vict. c. 46.

5. This Act may be cited for all purposes as the "Evidence Further Amendment Act, 1869." Short title.

6. This Act shall not extend to Scotland. Extent of Act.

42 & 43 VICT. C. 11 (BANKERS' BOOKS EVIDENCE ACT, 1879).

An Act to amend the Law of Evidence with respect to Bankers' Books. [23rd May, 1879.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as the Bankers' Books Evidence Act, 1879. Short title.

2. [Repeal of 39 & 40 Vict. c. 48.]

3. Subject to the provisions of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as *prima facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded. Repealed by 57 & 58 Vict. c. 56.
Mode of proof of entries in bankers' books.

Proof that book is a banker's book.

4. A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank.

Such proof may be given by a partner or officer of the bank, and may be given orally or by an affidavit sworn before any commissioner or person authorised to take affidavits.

Verification of copy.

5. A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be further proved that the copy has been examined with the original entry and is correct.

Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any commissioner or person authorised to take affidavits.

Case in which banker, &c., not compellable to produce book, &c.

6. A banker or officer of a bank shall not, in any legal proceeding to which the bank is not a party, be compellable to produce any bankers' book the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions, and accounts therein recorded, unless by order of a judge made for special cause.

Court or judge may order inspection, &c.

7. On the application of any party to a legal proceeding a Court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the Court or judge otherwise directs.

Costs.

8. The costs of any application to a Court or judge under or for the purposes of this Act, and the costs of anything done or to be done under an order of a Court or judge made under or for the purposes of this Act shall be in the discretion of the Court or judge, who may order the same or any part thereof to be paid to any party by the bank, where the same have been occasioned by any default or delay on the part of the bank. Any such order against a bank may be enforced as if the bank was a party to the proceedings.

Interpretation of "bank," "banker," and "bankers' books."

9. In this Act the expressions "bank" and "banker" mean any person, persons, partnership, or company carrying on the business of bankers and having duly made a return to the Commissioners of Inland Revenue, and also any savings bank certified

under the Acts relating to savings banks, and also any post office savings bank.

The fact of any such bank having duly made a return to the Commissioners of Inland Revenue may be proved in any legal proceeding by production of a copy of its return verified by the affidavit of a partner or officer of the bank, or by the production of a copy of a newspaper purporting to contain a copy of such return published by the Commissioners of Inland Revenue; the fact that any such savings bank is certified under the Acts relating to savings banks may be proved by an office or examined copy of its certificate; the fact that any such bank is a post office savings bank may be proved by a certificate purporting to be under the hands of Her Majesty's Postmaster-General or one of the secretaries of the Post Office.

Expressions in this Act relating to "bankers' books" include ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank.

10. In this Act—

The expression "legal proceeding" means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration;

The expression "the Court" means the Court, judge, arbitrator, persons, or person before whom a legal proceeding is held or taken;

The expression "a Judge" means with respect to England a Judge of the High Court of Justice, and with respect to Scotland a lord ordinary of the Outer House of the Court of Session, and with respect to Ireland a Judge of the High Court of Justice in Ireland;

The judge of a county court may with respect to any action in such Court exercise the powers of a judge under this Act.

11. Sunday, Christmas Day, Good Friday, and any bank holiday shall be excluded from the computation of time under this Act.

Interpre-
tation of
" legal
proceeding,"
" court,"
" judge."

Computation
of time.

51 & 52 VICT. C. 46 (OATHS ACT, 1888).

An Act to amend the Law as to Oaths.

[24th December, 1888.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal,

and commons, in this present Parliament assembled, and by the authority of the same, as follows:

When
affirmation
may be made
instead of
oath.

1. Every person upon objecting to being sworn, and stating, as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath; and if any person making such affirmation shall wilfully, falsely, and corruptly affirm any matter or thing which, if deposed on oath, would have amounted to wilful and corrupt perjury, he shall be liable to prosecution, indictment, sentence, and punishment in all respects as if he had committed wilful and corrupt perjury.

Form of
affirmation.

2. Every such affirmation shall be as follows:

“I, A. B., do solemnly, sincerely, and truly declare and affirm,” and then proceed with the words of the oath prescribed by law, omitting any words of imprecation or calling to witness.

Validity of
oath not
affected by
absence of
religious
belief.

3. Where an oath has been duly administered and taken, the fact that the person to whom the same was administered had, at the time of taking such oath, no religious belief, shall not for any purpose affect the validity of such oath.

Form of
affirmation
in writing.

4. Every affirmation in writing shall commence “I, _____, of _____, do solemnly and sincerely affirm,” and the form in lieu of jurat, shall be “Affirmed at _____, this _____ day of _____, 18 ____ . Before me.”

Swearing
with uplifted
hand.

5. If any person to whom an oath is administered desires to swear with uplifted hand, in the form and manner in which an oath is usually administered in Scotland, he shall be permitted to do so, and the oath shall be administered to him in such form and manner without further question.

Repeal.

6. The Acts mentioned in the schedule to this Act are hereby repealed to the extent in the third column of the schedule mentioned.

Short title.

7. This Act may be cited as the Oaths Act, 1888.

SCHEDULE.

Session and Chapter.	Title.	Extent of Repeal.
17 & 18 Vict. c. 125..	The Common Law Procedure Act, 1854.	Section twenty.
19 & 20 Vict. c. 102..	The Common Law Procedure Amendment Act (Ireland), 1856.	Sections twenty-three and twenty-four.
24 & 25 Vict. c. 66 ..	An Act to give relief to persons who may refuse or be unwilling, from alleged conscientious motives, to be sworn in criminal proceedings.	The entire Act.
28 & 29 Vict. c. 9....	The Affirmation (Scotland) Act, 1865.	The entire Act.
30 & 31 Vict. c. 35 ..	An Act to remove some defects in the administration of the Criminal Law.	Section eight.
31 & 32 Vict. c. 39 ..	The Jurors Affirmation (Scotland) Act, 1868.	The entire Act.
31 & 32 Vict. c. 75 ..	The Juries Act (Ireland), 1868.	Section three.
32 & 33 Vict. c. 68 ..	The Evidence Further Amendment Act, 1869.	Section four.
33 & 34 Vict. c. 49 ..	The Evidence Amendment Act, 1870.	The entire Act.

^f_E 42 & 43 VICT. C. 8 (REGISTRATION OF BIRTHS, DEATHS,
AND MARRIAGES (ARMY) ACT, 1879).

An Act to make further provision for the Registration of Deaths, Marriages, and Births occurring out of the United Kingdom among officers and soldiers of Her Majesty's Forces, and their families.

[23rd May, 1879.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal,

and commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title.

1. This Act may be cited as the Registration of Births, Deaths, and Marriages (Army) Act, 1879.

Transmission to registrar of registers of births, deaths, and marriages of army kept in pursuance of Her Majesty's regulations.

2. If Her Majesty is pleased from time to time to make regulations respecting the registration of deaths and births occurring and marriages solemnized out of the United Kingdom among officers and soldiers of Her Majesty's land forces and their families or any of them, the registers kept from time to time in pursuance of the said regulations shall, in manner provided by the regulations for the time being in force, be authenticated and transmitted to the Registrar-General of Births and Deaths in England.

Where it appears from any such register that an officer or soldier whose death or marriage is entered therein, or to whose family a person whose death, marriage, or birth is entered therein belonged, was a Scotch or Irish subject of Her Majesty, the Registrar-General of Births and Deaths in England shall, as soon as may be after receiving the register, send a certified copy of so much thereof as relates to such death, marriage, or birth to the Registrar-General of Births and Deaths in Scotland or Ireland, as the case may require.

Every Registrar-General of births and deaths to whom a register or certified copy of a register is sent, in pursuance of this section, shall cause the same to be filed and preserved in or copied in a book to be kept by him for the purpose, and to be called the Army Register Book, and such book shall be deemed to be a certified copy of the register book within the meaning of the Acts relating to the registration of births and deaths in England, Scotland, and Ireland respectively.

Provision as to existing documents evidencing deaths, marriages, and births among officers and soldiers of the army and their families.

3. Whereas, under the directions of Her Majesty, or of one of Her Majesty's Principal Secretaries of State, or the Commander-in-Chief or other lawful authority, various documents, such as registers, muster-rolls, and pay lists have been kept, showing the deaths and births which have occurred and the marriages which have been solemnized among officers and soldiers of Her Majesty's land forces and their families:

And whereas it is expedient to make further provision respecting the said documents: Be it therefore enacted as follows:

Where any of such documents, or any certified extracts thereof made under the direction of one of Her Majesty's Principal Secretaries of State, have either before or after the passing of this Act been transmitted to the Registrar-General of Births and

Deaths in England, such documents or extracts shall be deemed to be in the legal custody of the said Registrar-General, and shall be admissible in evidence; and a copy of any such document or extract of, or any part thereof, if purporting to be certified to be a true copy under the seal of the register office of the Registrar-General, shall be admissible in evidence of such document, extract, or part.

4. Nothing in this Act shall apply to any deaths, marriages, or births which occur in the United Kingdom, except where the same occurred before the commencement of this Act.

5. This Act shall come into operation on the first day of July one thousand eight hundred and seventy-nine, which day is in this Act referred to as the commencement of this Act.

Saving as to births, deaths, and marriages in the United Kingdom.
Commencement of Act.

52 VICT. C. 10 (COMMISSIONERS FOR OATHS ACT, 1889).

An Act for amending and consolidating enactments relating to the administration of Oaths. [31st May, 1889.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1.—(1.) The Lord Chancellor may from time to time, by commission signed by him, appoint persons being practising solicitors or other fit and proper persons to be commissioners for oaths, and may revoke any such appointment.

Appointment and powers of commissioners for oaths.

(2.) A commissioner for oaths may, by virtue of his commission, in England or elsewhere, administer any oath or take any affidavit for the purposes of any Court or matter in England, including any of the ecclesiastical courts or jurisdictions, matters ecclesiastical, matters relating to applications for notarial faculties, and matters relating to the registration of any instrument, whether under an Act of Parliament or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the Supreme Court, including all proceedings on the revenue side of the Queen's Bench Division.

(3.) Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding in which he is solicitor to any of the parties to the proceeding, or clerk to any such solicitor, or in which he is interested.

Powers of certain officers of Court, &c. to administer oaths.

Taking of oaths out of England.

Appointment of persons to administer oaths for prize proceedings.

Jurat to state where and when oath is taken.

Powers as to oaths and notarial acts abroad.

Amended by 54 & 55 Vict. c. 50, s. 2.

2. Every person who, being an officer of or performing duties in relation to any Court, is for the time being so authorized by a judge of the Court, or by or in pursuance of any rules or orders regulating the procedure of the Court, and every person directed to take an examination in any cause or matter in the Supreme Court, shall have authority to administer any oath or take any affidavit required for any purpose connected with his duties.

3.—(1.) Any oath or affidavit required for the purpose of any Court or matter in England, or for the purpose of the registration of any instrument in any part of the United Kingdom, may be taken or made in any place out of England before any person having authority to administer an oath in that place.

(2.) In the case of a person having such authority otherwise than by the law of a foreign country, judicial and official notice shall be taken of his seal or signature affixed, impressed, or subscribed to or on any such oath or affidavit.

4. The Lord Chancellor may, whenever it appears to him necessary to do so, authorize any person to administer oaths and take affidavits for any purpose relating to prize proceedings in the Supreme Court, whilst that person is on the high seas or out of Her Majesty's dominions, and it shall not be necessary to affix any stamp to the document by which he is so authorized.

5. Every commissioner before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.

6.—(1.) Every British ambassador, envoy, minister, chargé d'affaires, and secretary of embassy or legation exercising his functions in any foreign country, and every British consul-general, consul, vice-consul, acting-consul, pro-consul, and consular agent exercising his functions in any foreign place may, in that country or place, administer any oath and take any affidavit, and also do any notarial act which any notary public can do within the United Kingdom; and every oath, affidavit, and notarial act administered, sworn, or done by or before any such person shall be as effectual as if duly administered, sworn, or done by or before any lawful authority in any part of the United Kingdom.

(2.) Any document purporting to have affixed, impressed, or subscribed thereon or thereto the seal and signature of any person authorized by this section to administer an oath in testimony of any oath, affidavit, or act being administered, taken, or done by or before him, shall be admitted in evidence without proof of the

seal or signature being the seal or signature of that person, or of the official character of that person.

7. Whoever wilfully and corruptly swears falsely in any oath or affidavit taken or made in accordance with the provisions of this Act, shall be guilty of perjury in every case where if he had so sworn in a judicial proceeding before a Court of competent jurisdiction he would be guilty of perjury. **Perjury.**

8. Whoever forges, counterfeits, or fraudulently alters the seal or signature of any person authorized by or under this Act to administer an oath, or tenders in evidence, or otherwise uses, any affidavit having any seal or signature so forged or counterfeited or fraudulently altered, knowing the same to be forged, counterfeited, or fraudulently altered, shall be guilty of felony, and liable on conviction to penal servitude for any term not exceeding seven years and not less than five years, or to imprisonment with or without hard labour for any term not exceeding two years. **Forgery.**

9. Any offence under this Act, whether committed within or without Her Majesty's dominions, may be inquired of, dealt with, tried, and punished in any county or place in the United Kingdom in which the person charged with the offence was apprehended or is in custody, and for all purposes incidental to or consequential on the trial or punishment the offence shall be deemed to have been committed in that county or place. **Trial of offences.**

10. Where any offence under this Act is alleged to have been committed with respect to any affidavit, a judge of any Court before which the affidavit is produced may order the affidavit to be impounded and kept in such custody and for such time and on such conditions as he thinks fit. **Impounding of documents.**

11. In this Act, unless the context otherwise requires,— **Definitions.**

“Oath” includes affirmation and declaration:

“Affidavit” includes affirmation, statutory or other declaration, acknowledgment, examination, and attestation or protestation of honour:

“Swear” includes affirm, declare, and protest:

“Supreme Court” means the Supreme Court of Judicature in England.

12. The enactments specified in the schedule to this Act are hereby repealed to the extent specified in that schedule.

Provided that this repeal shall not affect—

(a) anything done or suffered under any enactment repealed by this Act; nor

(b) any appointment made under or authority given by or in pursuance of any enactment so repealed; nor

(c) any punishment incurred or to be incurred in respect of any offence committed before the commencement of this Act against any enactment so repealed; nor

(d) any legal proceeding for enforcing any such punishment;

and any such legal proceeding may be instituted or continued and any such punishment may be imposed as if this Act had not been passed.

Commissions
issued before
commence-
ment of Act.

13. A commissioner authorized before the commencement of this Act to administer oaths in the Supreme Court shall be deemed to be a commissioner for oaths within the meaning of this Act.

Commence-
ment.

14. This Act shall commence and come into operation on the first day of January one thousand eight hundred and ninety.

Short title.

15. This Act may be cited as the Commissioners for Oaths Act, 1889.

SCHEDULE.

A description or citation of a portion of an Act is inclusive of the words, sections, or other parts, first and last mentioned, or otherwise referred to as forming the beginning, or as forming the end respectively, of the portion comprised in the description or citation.

Session and Chapter.	Title.	Extent of Repeal.
16 & 17 Chas. 2, c. 9..	An Act to empower the Chancellor of the duchy to grant commissions for taking affidavits within the duchy liberty.	The whole Act.
17 Geo. 2, c. 7	An Act for taking and swearing affidavits to be made use of in any of the courts of the county palatine of Lancaster.	The whole Act.
4 Geo. 3, c. 21	An Act for taking and swearing affidavits to be made use of in any of the courts of the county palatine of Durham.	The whole Act.
5 Geo. 4, c. 87	An Act to regulate the payment of salaries and allowances to British consuls at foreign ports, and the disbursements at such ports for certain public purposes.	Section twenty.

Session and Chapter.	Title.	Extent of Repeal.
3 & 4 Will. 4, c. 42 ..	An Act for the further amendment of the law and the better advancement of justice.	Section forty-two.
4 & 5 Will. 4, c. 42 ..	An Act to facilitate the taking of affidavits and affirmations in the court of the Vice Warden of the Stannaries of Cornwall.	The whole Act.
2 & 3 Vict. c. 58	An Act to make further provision for the administration of justice and for improving the practice and proceedings in the courts of the Stannaries of Cornwall.	Section six from "and that any commissioner."
5 & 6 Vict. c. 103....	An Act for abolishing certain offices of the High Court of Chancery in England.	Sections seven and eight.
6 & 7 Vict. c. 82	An Act the title of which begins with the words "An Act for extending," and ends with the words "examination of witnesses."	Sections one to four.
11 & 12 Vict. c. 10 ..	An Act for empowering certain officers of the High Court of Chancery to administer oaths and take declarations and affirmations.	The whole Act.
15 & 16 Vict. c. 76 ..	The Common Law Procedure Act, 1852.	Section twenty-three.
15 & 16 Vict. c. 86 ..	An Act to amend the practice and course of proceeding in the High Court of Chancery.	Sections twenty-two, twenty-three and twenty-four.
16 & 17 Vict. c. 70 ..	The Lunacy Regulation Act, 1853.	Section fifty-seven.
16 & 17 Vict. c. 78 ..	An Act relating to the appointment of persons to administer oaths in Chancery, and to affidavits made for purposes connected with registration.	The whole Act.

Session and Chapter.	Title.	Extent of Repeal.
17 & 18 Vict. c. 78 ..	The Admiralty Court Act, 1854.	Section six from "and any examiner" to the end of the section. Sections seven to eleven.
18 & 19 Vict. c. 42 ..	An Act to enable British diplomatic and consular agents abroad to administer oaths and do notarial acts.	The whole Act.
18 & 19 Vict. c. 134..	An Act the title of which begins with the words "An Act to make further provision," and ends with the words "leasing and sale thereof."	Section fifteen.
20 & 21 Vict. c. 77 ..	An Act to amend the law relating to probates and letters of administration in England.	Section twenty-seven to "Provided that," and from "and any person who" to end of section.
21 & 22 Vict. c. 95 ..	An Act to amend the Act of the twentieth and twenty-first Victoria, chapter seventy-seven.	Sections thirty to thirty-four.
21 & 22 Vict. c. 108..	An Act to amend the Act of the twentieth and twenty-first Victoria, chapter eighty-five.	Sections twenty to twenty-three.
22 Vict. c. 16.....	An Act the title of which begins with the words "An Act to enable," and ends with the words "of the Exchequer."	The whole Act except section five.
28 & 29 Vict. c. 104..	The Crown Suits, &c. Act, 1865.	Sections eighteen, nineteen, forty-three, and forty-four.
32 & 33 Vict. c. 38 ..	The Bails Act, 1869.....	The whole Act.
40 & 41 Vict. c. 25 ..	The Solicitors Act, 1877 ...	Section eighteen.

54 & 55 VICT. C. 50 (COMMISSIONERS FOR OATHS ACT, 1891).

An Act to amend the Commissioners for Oaths Act, 1889.

[5th August, 1891.]

WHEREAS doubts have been entertained whether the powers to administer oaths and take affidavits conferred on a commissioner for oaths by the Commissioners for Oaths Act, 1889, extend to oaths and affidavits required by special provisions to be made before a justice of the peace, or any particular person or officer, and it is expedient to remove such doubts:

52 & 53 Vict.
c. 10.

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Where by or under the Merchant Shipping Acts, 1854 to 1889, or the Customs Consolidation Act, 1876, or the Patents, Designs, and Trade Marks Acts, 1883 to 1888, or the Pawnbrokers Act, 1872, or Acts amending the same respectively, any oath or affidavit is required to be taken or made before any particular person or officer, whether having special authority or otherwise, and whether at any particular place, or within any specified limits or otherwise, such oath or affidavit may be taken or made before a commissioner for oaths, at any place, and shall be as effectual to all intents and purposes as if taken or made before such person or officer, and at any particular place or within specified limits.

Affidavit, &c.
may be made
before com-
missioner at
any place.

2. In section six of the Commissioners for Oaths Act, 1889, after the words "consular agent" shall be inserted the words "acting consul general, acting vice-consul, and acting consular agent."

Amendment
of 52 & 53
Vict. c.10, s.6,
as to acting
consular
agent.

3. This Act shall be read with the Commissioners for Oaths Act, 1889, and may be cited as the Commissioners for Oaths Act, 1891, and the Commissioners for Oaths Act, 1889, and this Act may be cited together as the Commissioners for Oaths Acts, 1889 and 1891.

Construction
and short
title.

45 & 46 VICT. C. 75 (MARRIED WOMEN'S PROPERTY ACT, 1882), s. 17.

An Act to consolidate and amend the Acts relating to the Property of Married Women. [18th August, 1882.]

17. In any question between husband and wife as to the title to or possession of property, either party, or any such bank,

Questions
between

husband and wife as to property to be decided in a summary way.

corporation, company, public body, or society as aforesaid in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or Ireland, according as such property is in England or Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute) in England to the judge of the county court of the district, or in Ireland to the chairman of the civil bill court of the division in which either party resides, and the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court (as the case may be) may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit: Provided always, that any order of a judge of the High Court of Justice to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same judge in a suit pending or on an equitable plaint in the said Court would be, and any order of a county or civil bill court under the provisions of this section shall be subject to appeal in the same way as any other order made by the same court would be, and all proceedings in a county court or civil bill court under this section in which, by reason of the value of the property in dispute, such Court would not have had jurisdiction if this Act, or the Married Women's Property Act, 1870, had not passed, may, at the option of the defendant or respondent to such proceedings, be removed as of right into the High Court of Justice in England or Ireland (as the case may be), by writ of certiorari or otherwise as may be prescribed by any rule of such High Court; but any order made or act done in the course of such proceedings prior to such removal shall be valid, unless order shall be made to the contrary by such High Court: Provided also, that the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court, if either party so require, may hear any such application in his private room: Provided also, that any such bank, corporation, company, public body or society as aforesaid, shall, in the matter of any such application for the purposes of costs or otherwise, be treated as a stakeholder only.

56 & 57 VICT. C. 63 (MARRIED WOMEN'S PROPERTY ACT, 1893).

An Act to amend the Married Women's Property Act, 1882.

[5th December, 1893.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Every contract hereafter entered into by a married woman, otherwise than as agent,

Effect of
contracts
by married
women.

- (a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract;
- (b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and
- (c) shall also be enforceable by process of law against all property which she may thereafter while discoverd be possessed of or entitled to;

Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating.

2. In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver, and the sale of the property or otherwise as may be just.

Costs may be
ordered to be
paid out of
property
subject to
restraint on
anticipation.

3. Section twenty-four of the Wills Act, 1837, shall apply to the will of a married woman made during coverture whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband.

Will of
married
women.

4. Sub-sections (3) and (4) of section one of the Married Women's Property Act, 1882, are hereby repealed.

Repeal.

5. This Act may be cited as the Married Women's Property Act, 1893.

Short title.

6. This Act shall not apply to Scotland.

Extent.

44 & 45 VICT. c. 68 (SUPREME COURT OF JUDICATURE ACT,
1881).

*An Act to amend the Supreme Court of Judicature Acts; and
for other purposes.* [27th August, 1881.]

Short title.

1. This Act may be cited as the Supreme Court of Judicature Act, 1881.

Master of
the Rolls to
be Judge of
Appeal only.

2. From and after the passing of this Act the present and every future Master of the Rolls shall cease to be a judge of Her Majesty's High Court of Justice, but shall continue by virtue of his office to be a judge of Her Majesty's Court of Appeal, and shall retain the same rank, title, salary, right of pension, patronage, and powers of appointment or dismissal, and all other powers, privileges, and disqualifications now and heretofore belonging to the said office of Master of the Rolls and all other duties of the said office except that of a judge of Her Majesty's High Court of Justice: Provided that the present Master of the Rolls shall not by virtue of this Act be subject to any disqualification to which he is not by law now subject, nor shall be required to act under any commission of assize, nisi prius, oyer and terminer, or gaol delivery; and the existing personal officers of the Master of the Rolls shall continue to be attached to him and be under his authority, and to hold their respective offices upon the same tenure and in the same manner in all respects as if this Act had not passed: Provided also, that any Master of the Rolls to be hereafter appointed shall be under an obligation to go circuits and to act as a commissioner under commissions of assize, or other commissions authorised to be issued in pursuance of the Supreme Court of Judicature Act, 1873, in the same manner in all respects as he would have been under the last-mentioned Act, or any Acts or Act amending the same, if he had continued to be a judge of the Chancery Division of the High Court of Justice.

36 & 37 Vict.
c. 66.

Existing
vacancy in
Court of
Appeal not to
be filled up.

3. The vacancy now existing among the ordinary judges of the said Court of Appeal shall not be filled up, and the number of ordinary judges of that Court shall henceforth be five.

President of
Probate Divi-
sion to be an
ex-officio
judge of
Court of
Appeal.

4. The President for the time being of the Probate, Divorce, and Admiralty Division of the High Court of Justice shall henceforth be an ex-officio judge of Her Majesty's Court of Appeal with the same powers, and in the same manner in all respects as the other ex-officio judges thereof; he shall not be entitled in the said Court to any precedence over any existing judge to which

he would not have been entitled as a judge of the Supreme Court of Judicature if this Act had not passed.

5. It shall be lawful for Her Majesty to supply the vacancy in the High Court of Justice, to be occasioned by the removal therefrom of the Master of the Rolls, by the appointment, immediately after the passing of this Act, and from time to time afterwards, of a judge, who shall be in the same position as if he had been appointed a puisne judge of the said High Court in pursuance of the Judicature Acts, 1873 and 1875; and all the provisions of the Supreme Court of Judicature Acts, 1873 and 1875, for the time being in force in relation to the qualification and appointment of puisne judges of the said High Court, and to their duties and tenure of office, and to their precedence, and to their salaries and pensions, and to the officers to be attached to the persons of such judges, and all other provisions relating to such puisne judges, or any of them, with the exception of such provisions as apply to existing judges only, shall apply to the judge appointed in pursuance of this section, in the same manner as they apply to the other puisne judges of the said High Court respectively. The judge so appointed shall be attached to the Chancery Division of the said High Court, subject to such power of transfer as is in the Supreme Court of Judicature Act, 1873, mentioned.

New judge of High Court instead of Master of the Rolls.

36 & 37 Vict. c. 66.
38 & 39 Vict. c. 77.

6. The power given to Her Majesty by the Supreme Court of Judicature Act, 1877, to appoint a judge of the High Court of Justice in addition to the number of judges authorized to be appointed by the Supreme Court of Judicature Acts, 1873 and 1875, may be exercised by Her Majesty from time to time, so as at all times to make due provision for the business of the Chancery Division of the High Court of Justice: Provided that no such appointment shall be made unless or until the number of judges attached for the time being to the Chancery Division of the High Court, other than the Lord Chancellor, is, by death, resignation, or otherwise, reduced below five.

Judge under 40 & 41 Vict. c. 9.

7. The Lord Chancellor shall have power by order under his hand to direct that the court and chambers, heretofore used by the Master of the Rolls as a judge of the Chancery Division of the High Court of Justice, shall (so long as may be necessary or convenient) be used by such judge of the said Chancery Division of the said High Court as shall be in any such order in that behalf named; and the chief and other clerks, and other officers, heretofore attached to the said court and chambers respectively, shall (subject to any rules or orders of Court) be and continue attached to the judge to be named in any such order, and, after such court

Rolls Court Chambers and clerks, &c.

and chambers shall have ceased to be so used, to the judge to whom the business previously transacted in such court and chambers respectively shall be for the time being assigned.

Title of
justices.
40 & 41 Vict.
c. 9.

8. And whereas it is expedient to amend section four of the Supreme Court of Judicature Act, 1877: Be it enacted that the exception of presidents of divisions from the enactment that the judges of the High Court of Justice shall be styled Justices of the High Court shall not apply to any judge to be hereafter appointed who may be or become President of the Probate, Divorce, and Admiralty Division of the High Court of Justice.

Appeals
under
Divorce Acts.

9. All appeals which, under section fifty-five of the Act of the twentieth and twenty-first years of her present Majesty, chapter eighty-five, or under any other Act, might be brought to the full Court established by the said first-mentioned Act, shall henceforth be brought to Her Majesty's Court of Appeal and not to the said full Court.

The decision of the Court of Appeal on any question arising under the Acts relating to divorce and matrimonial causes, or to the declaration of legitimacy, shall be final, except where the decision either is upon the grant or refusal of a decree on a petition for dissolution or nullity of marriage, or for a declaration of legitimacy, or is upon a question of law on which the Court of Appeal give leave to appeal; and, save as aforesaid, no appeal shall lie to the House of Lords under the said Acts.

39 & 40 Vict.
c. 59.

Subject to any order made by the House of Lords, in accordance with the Appellate Jurisdiction Act, 1876, every appeal to the House of Lords against any such decision shall be brought within one month after the decision appealed against is pronounced by the Court of Appeal if the House of Lords is then sitting, or, if not within fourteen days after the House of Lords next sits.

This section, so far as is consistent with the tenor thereof, shall be construed as one with the said Acts.

As to appeal
against
decrees nisi
for dissolu-
tion or nullity
of marriage.

10. No appeal from an order absolute for dissolution or nullity of marriage shall henceforth lie in favour of any party who, having had time and opportunity to appeal from the decree nisi on which such order may be founded, shall not have appealed therefrom.

47 & 48 VICT. C. 61, s. 14 (SUPREME COURT OF JUDICATURE
Act, 1884).

*An Act to amend the Supreme Court of Judicature Acts;
and for other purposes.* [14th August, 1884.]

14. Where any person neglects or refuses to comply with a judgment or order directing him to execute any conveyance, contract, or other document, or to indorse any negotiable instrument, the Court may, on such terms and conditions (if any) as may be just, order that such conveyance, contract, or other document shall be executed, or that such negotiable instrument shall be indorsed by such person as the Court may nominate for that purpose; and in such case the conveyance, contract, document, or instrument so executed or indorsed shall operate and be for all purposes available as if it had been executed or indorsed by the person originally directed to execute or indorse it.

Execution of
instruments
by order of
the Court.

53 & 54 VICT. C. 44 (SUPREME COURT OF JUDICATURE ACT,
1890).

An Act to amend the Supreme Court of Judicature Acts.
[14th August, 1890.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. From and after the commencement of this Act every motion for a new trial, or to set aside a verdict, finding, or judgment (*b*), in any cause or matter in the High Court in which there has been a trial thereof, or of any issue therein with a jury shall be heard and determined by the Court of Appeal and not by a divisional court of the High Court: Provided always, that such motions shall be heard and determined before not less than three judges of the Court of Appeal sitting together.

Motions for
new trial.

This section shall extend to every such motion of which notice may have been given, whether before or after the passing of this

(*b*) This does not apply to a motion for a re-hearing of a Divorce Cause, which has been heard by a judge without a jury, which must still be made to a Divisional Court. See *ante*, pp. 223, 525.

Act, but which has not been heard before the commencement of this Act.

Motions for judgment.

2. Every motion for judgment in any such case or matter shall be heard and determined by the judge before whom such trial with a jury took place, and not by a divisional court, unless it be impossible or inconvenient that such judge should act, in which case such motion shall be heard and determined by some other judge to be nominated by the president of the division to which the cause or matter belongs.

Power to make rules.

3. The power of making rules conferred by the Supreme Court of Judicature Act, 1873, and the Acts amending the same shall extend to this Act.

Criminal and bankruptcy matters.

4. Nothing in this Act shall alter the practice in any criminal cause or matter or in bankruptcy, or in proceedings on the Crown side of the Queen's Bench Division.

Costs.

5. Subject to the Supreme Court of Judicature Acts, and the rules of Court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and to what extent such costs are to be paid.

Extent of Act.

6. This Act shall not apply to Ireland or Scotland.

Commencement and short title.

7. This Act shall commence on the twenty-fourth day of October one thousand eight hundred and ninety, and may be cited for all purposes as the Supreme Court of Judicature Act, 1890.

54 & 55 VICT. c. 53 (SUPREME COURT OF JUDICATURE ACT, 1891).

An Act to amend the Supreme Court of Judicature Acts.

[5th August, 1891.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

Ex-Lord Chancellor to be a judge of Court of Appeal.

1. Every person who has held the office of Lord Chancellor shall be an ex-officio judge of the Court of Appeal, but he shall not be required to sit and act as a judge of that Court, unless upon the request of the Lord Chancellor he consents so to do,

and while so sitting and acting he shall rank therein according to his precedence as a peer.

2. Whenever there is a vacancy in the office of a judge of the High Court who is president of the Probate, Divorce, and Admiralty Division thereof, it shall be lawful for Her Majesty, by letters patent, to appoint to that office as president of the said division any person who is a barrister of not less than fifteen years' standing, or who is a judge of the High Court or Court of Appeal, and the person so appointed shall, without prejudice to the rights of any judge of the Supreme Court existing at the passing of this Act, take precedence in Court next after all ordinary judges of the Court of Appeal appointed before the time at which he shall become an ordinary or ex-officio member thereof.

President of
Probate,
Divorce, and
Admiralty
Division.

3. For the purpose of aiding the House of Lords in the hearing and determination of appeals in Admiralty actions, the House may, in any such appeal in which it may think it expedient to do so, call in the aid of one or more assessors specially qualified, and hear such appeal wholly or partially with the assistance of such assessors.

Assessors in
House of
Lords.

This section shall be carried into effect in pursuance of orders made by the House of Lords.

4. Whereas doubts have arisen with respect to the position of the High Court in England and appeals therefrom in cases of prize, and it is expedient to remove such doubts: Be it therefore enacted as follows:

Explanation
of position
of High
Court of
Justice under
27 & 28 Vict.
c. 25.

(1.) The High Court in England shall be a prize court within the meaning of the Naval Prize Act, 1864, and shall have all such jurisdiction on the high seas, and throughout Her Majesty's dominions, and in every place where Her Majesty has jurisdiction, as under the Naval Prize Act, 1864, or otherwise the High Court of Admiralty possessed when acting as prize court.

(2.) Subject to rules of Court, all causes and matters within the jurisdiction of the High Court under this Act as a prize court shall be assigned to the Probate, Divorce, and Admiralty Division of the Court.

(3.) Any appeal from the High Court when acting as a prize court shall lie only to Her Majesty in Council, in accordance with the Naval Prize Act, 1864.

5. This Act may be cited as the Supreme Court of Judicature Act, 1891, and shall be construed as one with the Supreme Court of Judicature Acts, 1873 to 1890, which Acts, with this Act, may be cited together as the Judicature Acts, 1873 to 1891.

Short titles
and con-
struction.

57 & 58 VICT. c. 16 (SUPREME COURT OF JUDICATURE
(PROCEDURE) ACT, 1894).

See *ante*, pp. 531, 532.

28 & 29 VICT. c. 64.

*An Act to remove Doubts respecting the Validity of cer-
tain Marriages contracted in Her Majesty's Possessions
Abroad.* [29th June, 1865.]

WHEREAS laws have from time to time been made by the legislatures of divers of Her Majesty's possessions abroad for the purpose of establishing the validity of certain marriages previously contracted therein, but doubts are entertained whether such laws are in all respects effectual for the aforesaid purpose beyond the limits of such possessions: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

Colonial laws establishing validity of marriages to have effect throughout Her Majesty's dominions.

Not to give effect to marriages unless parties are competent to contract marriage.

Definition of "Legislature."

1. Every law made or to be made by the legislature of any such possession as aforesaid for the purpose of establishing the validity of any marriage or marriages contracted in such possession shall have and be deemed to have had from the date of the making of such law the same force and effect for the purpose aforesaid within all parts of Her Majesty's dominions as such law may have had or may hereafter have within the possession for which the same was made: Provided that nothing in this law contained shall give any effect or validity to any marriage unless at the time of such marriage both of the parties thereto were, according to the law of England, competent to contract the same.

2. In this Act the word "legislature" shall include any authority competent to make laws for any of Her Majesty's possessions abroad, except the Parliament of the United Kingdom and Her Majesty in Council.

31 & 32 VICT. C. 61 (CONSULAR MARRIAGE ACT, 1868).

An Act for removing Doubts as to the Validity of certain Marriages between British Subjects in China and elsewhere, and for amending the Law relating to the Marriage of British Subjects in Foreign Countries.

Repealed by
55 & 56 Vict.
c. 23.

[16th July, 1868.]

42 & 43 VICT. C. 29.

An Act to remove Doubts as to the Validity of certain Marriages of British Subjects on board Her Majesty's ships.

[21st July, 1879.]

WHEREAS officers commanding Her Majesty's ships on foreign stations have permitted marriages to be solemnized according to religious rites or ceremonies, or to be contracted *per verba de præsenti* in the presence of such officers, in the belief that marriages were authorized by law to be so solemnized and contracted, and doubts have arisen with respect to the validity of such marriages, and it is expedient to confirm the same.

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as "The Confirmation of Marriages on Her Majesty's Ships Act, 1879." Short title.

2. All marriages, both of the parties being British subjects, which before the passing of this Act have been solemnized on board one of Her Majesty's vessels on a foreign station in the presence of the officer commanding such vessel, whether solemnized according to any religious rite or ceremony, or contracted *per verba de præsenti*, shall be valid in like manner as if the same had been solemnized within Her Majesty's dominions with the due observance of all forms required by law. Confirmation of marriages of British subjects solemnized on board Her Majesty's ships.

Provided that this enactment shall not render valid any marriage which before the passing of this Act has been declared invalid by any court of competent jurisdiction in any proceeding touching such marriage, or any right dependent on the validity or invalidity thereof, or render valid any marriage where either of the parties has before the passing of this Act and during the life of the other party lawfully intermarried with any person.

47 & 48 VICT. c. 20.

An Act to remove Doubts as to the Validity of certain Marriages of Members of the Greek Church in England.

[3rd July, 1884.]

WHEREAS it is alleged that certain marriages have been from time to time, between the years one thousand eight hundred and thirty-six and one thousand eight hundred and fifty-seven, solemnized between members of the Greek Church in the Greek Chapel then situate at 9, Finsbury Circus, in the City of London, and afterwards, within the said period, at London Wall, in the said city:

And that similar marriages have been from time to time, within the said period, solemnized at the residences of members of the said church:

And that such marriages were respectively solemnized in conformity with the rites and ceremonies of the Greek Church by a priest of that Church, and entries of the said respective marriages so solemnized have from time to time been made in the register book kept for that purpose at the said chapels respectively, or otherwise, in the custody of the said priest:

And that the said marriages were respectively solemnized in the belief that the aforesaid conformity to and compliance with the rites and ceremonies of the Greek Church constituted a compliance with the law of England:

And whereas objections may be made to the validity of such marriages, by reason of the same not having been solemnized in any consecrated or licensed church or chapel of the Church of England, or in any registered building, or at the office of the registrar, and not having been solemnized after due publication of banns, or under licence or special licence, or in the presence of a Clerk in Holy Orders of the Church of England, or a registrar of marriages, and it is expedient to confirm, in the manner and subject to the proviso hereinafter mentioned, any marriage which may have been contracted in the manner and under the circumstances aforesaid, notwithstanding all or any of the aforesaid defects:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Any party to any such marriage as aforesaid, and any child or grandchild of any such party, and any person interested in the validity of any such marriage, may respectively apply to the

Certain marriages at chapels in Finsbury

Probate and Matrimonial Division of Her Majesty's High Court of Justice by petition, praying the Court for a decree declaring that such marriage was a valid marriage; and the said Court shall have jurisdiction to hear and determine such application, and shall, if an entry of such marriage shall appear to have been duly made upon the register book aforesaid, and if the Court be satisfied that such marriage was solemnized in the manner and in the belief aforesaid, and was in all other respects good and lawful, declare the same to have been a valid marriage, notwithstanding all or any of the defects aforesaid: Provided always, that this Act shall not extend to render valid any marriage which before the passing thereof has been declared invalid by any Court of competent jurisdiction in any proceeding touching such marriage, or any right dependent on the validity or invalidity thereof, or any marriage where either of the parties thereto has afterwards during the life of the other intermarried with any other person.

Circus and London Wall or at residence of members of Greek Church, to be valid.

Any petition under this Act shall be accompanied by such affidavit verifying the same as the said Court may from time to time direct.

In respect of all matters and things by this Act not specially provided for, the provisions of sections five, six, and seven of the Act 21 & 22 Vict. c. 93, shall *mutatis mutandis* apply, and all proceedings under this Act shall be had and taken in conformity therewith, and with such of the rules for the time being in force with reference to applications to the Court under the said Act as may be applicable, or with such rules as the judges of the said Court for the time being authorized to make rules may from time to time prescribe.

2. Provided always, and be it further enacted, that the status of any person or any right of any person to any real or personal property or any estate or interest of any such person in any real or personal property which may be dependent on the invalidity of any such marriage shall not be altered, taken away, or injuriously affected by any decree made under the provisions of this Act; but shall be and remain as valid and effectual in law to all intents and purposes as if this Act had not been passed.

Saving for status and right to property dependent on invalidity of marriage.

3. The priest of the Greek Church, or other the person in whose custody the register books relating to such marriages as aforesaid shall be kept, on the passing of this Act, shall forthwith transmit to the registrar of the probate and matrimonial registry a copy signed by him of the register aforesaid, and the said registrar shall receive and preserve the same in the said registry.

Certificates of marriages to be transmitted to probate and matrimonial registry.

4. This Act may be cited as the Greek Marriages Act, 1884.

Short title.

61 & 62 VICT. c. 58 (MARRIAGE ACT, 1898).

An Act to amend the Law relating to the Attendance of Registrars at Marriages in Nonconformist Places of Worship.
[12th August, 1898.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title
and con-
struction.

1.—(1.) This Act may be cited as the Marriage Act, 1898, and may be cited with the Marriage Acts, 1811 to 1886.

6 & 7 Will. 4,
c. 85.

(2.) The term "registered building," wherever used in this Act, shall mean any building registered for solemnizing marriages therein under the Marriage Act, 1836.

(3.) For the purposes of this Act, as applied to Roman Catholic registered buildings, the words "trustees or governing body" shall include the bishop or vicar general of the diocese.

Extent of
Act.

2. This Act shall not extend to Scotland or Ireland.

Commence-
ment of Act.
Solemnization
of marriages
without
presence of
registrar.

3. This Act shall come into operation on the first day of April one thousand eight hundred and ninety-nine.

4. Notwithstanding anything contained in section twenty of the Marriage Act, 1836, marriages may be lawfully solemnized in the registered building named in the notice of the marriages and in the superintendent registrar's certificate or certificate and licence issued pursuant to the provisions of the said Act, or any Act amending the same, between and by the parties described in the notice and certificate or certificate and licence, according to such form and ceremony as they may see fit to adopt, without the presence of any registrar, but in the presence of such duly authorized person as herein-after mentioned, and subject in all other respects, excepting as is herein provided, to all the conditions and provisoes contained in the said Act and any Acts amending the same.

Notices and
forms.

5.—(1.) Whenever a marriage is intended to be solemnized in a registered building, and the parties intending to contract the marriage have duly fulfilled all the conditions from time to time required by law to entitle the superintendent registrar to issue a certificate or certificate and licence authorizing the marriage, and the superintendent registrar does not receive notice, at the time when the form of notice of marriage as required by law is given to him, that the parties intending to contract the marriage require a registrar to be present at the marriage, the superintendent registrar shall, subject to the provisions of this Act,

issue under his hand to one of those parties a certificate, or certificate and licence, as the case may require, in accordance with the forms set forth in Schedules B. and C. annexed to the Marriage and Registration Act, 1856.

19 & 20 Vict.
c. 119.

(2.) The superintendent registrar shall at the same time give to one of the parties intending to contract the marriage printed instructions in the prescribed form for the due solemnization of the marriage.

6.—(1.) Where a marriage is solemnized under this Act each of the parties contracting the marriage shall in some part of the ceremony make the following declarations:—

Declarations
to be made
in presence
of authorized
person.

“I do solemnly declare that I know not of any lawful impediment why I, A. B., may not be joined in matrimony to C. D.”

And each of the parties shall say to the other the words following:—

“I call upon these persons here present to witness that I, A. B., do take thee, C. D., to be my lawful wedded wife [or husband],” or in lieu thereof the words following:—

“I, A. B., do take thee, C. D., to be my wedded wife [or husband].”

(2.) The aforesaid declarations shall be made in the presence of the authorized person herein-after mentioned and two or more witnesses.

(3.) No marriage under this Act shall be solemnized in any registered building except in the presence of a person (in this Act referred to as an authorized person) certified as having been duly authorized for the purpose by the trustees or other governing body of the building, or of some registered building in the same registration district.

(4.) Where a person has been so authorized in respect of any registered building, the trustees or governing body of that building shall, within the prescribed time and in the prescribed manner, certify the name and address of the person or persons authorized for that building to the registrar general and to the superintendent registrar of the district in which the building is situate.

7.—(1.) In the case of the solemnization of a marriage under this Act, the certificate or certificate and licence required by law shall be delivered to the authorized person in whose presence the marriage is solemnized, who shall, immediately after the marriage, register in duplicate in two of the marriage register books provided for the purpose the several particulars relating to the marriage according to the form in Schedule C. annexed to

Register
books and
returns.

6 & 7 Will. 4, c. 86. the Births and Deaths Registration Act, 1836, and every such entry shall be signed by the authorized person, and by the parties to the marriage, and by two witnesses; and all such entries shall be made in consecutive order from the beginning to the end of each book, and the numbers of the place of entry of each duplicate marriage register book shall be the same.

(2.) The registrar general shall, when so requested by the authorized person, or the trustees or governing body of any registered building in which marriages may be solemnized under this Act, supply a sufficient number, in duplicate, of such marriage register books and forms for certified copies thereof as may be required for the purposes of this Act.

(3.) A marriage under this Act shall not be solemnized in any registered building until duplicate register books have been so supplied.

(4.) If the registrar general is not satisfied with respect to any building registered, or proposed to be registered, for the solemnization of marriages therein, that sufficient security exists for the due registration of marriages under this Act and for the safe custody of marriage register books, he may in his discretion attach to the continuance on the register or registration of the building a condition that no marriages under this Act shall be solemnized therein.

6 & 7 Will. 4, c. 86. (5.) Section thirty-five of the Births and Deaths Registration Act, 1836, shall apply in the case of a person having the custody of a marriage register book under rules made in pursuance of this Act, in like manner as it applies in the case of a rector, vicar, or curate.

Custody of certificate and licence. 8. The certificate or certificate and licence, as the case may be, shall be kept in the prescribed custody, and shall be produced with the marriage register books as and when required by the registrar general.

Fees. 9. The fees payable to the superintendent registrars under the 6 & 7 Will. 4, c. 85. Marriage Act, 1836, and the Marriage and Registration Act, 1856, in respect of marriages, whether with or without licence, 19 & 20 Vict. c. 119. shall be payable in respect of marriages under this Act.

Saving for right to require attendance of registrar. 10. Where the contracting parties give notice to the superintendent registrar that it is the wish of the parties to be married in the presence of the district registrar, nothing in this Act contained shall relieve the registrar from attendance at such marriage as now by law required and the fulfilment of the duties now imposed by law, and in case of such attendance the registrar shall be entitled to the fees now authorized by law.

Provisions as to registers 11.—(1.) The authorized person for a registered building shall, in the months of April, July, October, and January respectively,

make and deliver to the superintendent registrar of the district in which the registered building is situate, on forms supplied by the registrar general, a true copy certified by him under his hand of all the entries of marriages in the register book since the date of the last certified copy, and if there has been no marriage registered in the book since that date, shall certify the fact under his hand on a form to be supplied by the registrar general, and shall in accordance with rules under this Act keep the marriage register books safely until they are filled. and certified copies.

(2.) The superintendent registrar shall pay or cause to be paid to the authorized person the sum of sixpence for every entry contained in the said certified copy, and this sum shall be reimbursed to the superintendent registrar by the board of guardians of the union for which he is appointed.

(3.) When any such register book is filled, one copy thereof shall be delivered to the superintendent registrar of the district in which the registered building is situate, and the other shall be kept in the prescribed custody.

(4.) Section twenty-nine of the Births and Deaths Registration Act, 1837, shall apply in the case of an authorized person in like manner as it applies in the case of a rector, vicar, or curate. 7 Will. 4 & 1 Vict. c. 22.

(5.) Every superintendent registrar shall four times in every year send to the registrar general the certified copies received by him under this section in the same manner and under the same conditions as are directed with respect to the certified copies of marriages solemnized in churches and chapels under the Births and Deaths Registration Act, 1836. 6 & 7 Will. 4, c. 86.

12. If any authorized person refuses or fails to comply with this Act, or the enactments or regulations for the time being in force with respect to the solemnization and registration of marriages, he shall be guilty of an offence under this Act, and shall be liable, on summary conviction, to a penalty not exceeding ten pounds, or on conviction on indictment to imprisonment with or without hard labour for a term not exceeding two years or to a fine not exceeding fifty pounds, and shall, upon conviction, cease to be an authorized person. Offences.

13. Nothing in this Act shall be taken to relate or have any reference to marriages solemnized in accordance with the practice and usages of the Society of Friends or of persons professing the Jewish religion. Saving for Society of Friends and Jews.

14. Section twenty-three of the Births and Deaths Registration Act, 1837, relating to marriages in the Welsh tongue, shall apply in the case of marriages under this Act. Provisions for marriage in the Welsh tongue.

Repeal.

6 & 7 Will. 4,
c. 85.

15. So much of sections thirty-nine and forty-two of the Marriage Act, 1836, as punishes the solemnization of or renders void any marriage by reason of the absence of the registrar is hereby repealed in respect of any marriage authorized by and solemnized in accordance with this Act.

Rules.

16. The registrar general may, with the approval of the Local Government Board, make rules with respect to—

(a) The forms to be used for the purposes of this Act;

(b) The custody of documents required for the purposes of this Act;

(c) The duties of registrars, superintendent registrars, and authorized persons under this Act;

(d) Any matter which may under this Act be prescribed;

and generally for carrying into effect the provisions of this Act.

Temporary
provision as
to fees.

17.—(1.) On the issue of any certificate for a marriage to be solemnized in accordance with this Act, the parties to the marriage shall pay to the superintendent registrar of the district in which the registered building selected for the marriage is situate, an additional fee of six shillings and sixpence if the marriage is by licence, and otherwise a fee of four shillings. Provided that not more than one such fee shall be paid in respect of any one marriage.

(2.) Where there is only one registrar of marriages for the district, who was appointed before the passing of this Act, the superintendent registrar shall, at the end of each quarter, pay the fees so received by him to that registrar, and where there are more such registrars he shall, at the end of each quarter, divide the amount of the fees so received by him among those registrars in accordance with rules to be made under this Act.

(3.) This section shall not continue in force for more than ten years from the commencement of this Act, and shall not apply to a district unless there is acting therein a registrar of marriages appointed before the passing of this Act.

62 & 63 VICT. c. 27 (MARRIAGES VALIDITY ACT, 1899).

An Act to remove doubts as to the Validity of certain Marriages. [9th August, 1899.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Validation
of certain
marriages.

1. No marriage solemnized, or to be hereafter solemnized, in any church in England or in Ireland, after publication of banns

in such church, shall be or be deemed to have been invalid by reason only that one of the parties to such marriage was in the case of a marriage in England resident in Ireland, or in the case of a marriage in Ireland resident in England, and that banns may have been published in any church of the parish or place in which such party was resident, according to the law or custom there prevailing, and not in the manner required for the publication of banns in the part of the United Kingdom in which the marriage has been solemnized.

2. This Act may be cited as the Marriages Validity Act, 1899. Short title.

1 EDW. 7, C. 23 (MARRIAGES LEGALIZATION ACT, 1901).

An Act for legalizing Marriages heretofore solemnized in certain Churches and Places. [17th August, 1901.]

WHEREAS doubts have arisen as to the validity of certain marriages solemnized in certain churches and places mentioned in this Act, and it is expedient to remove those doubts:

Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.—(1.) All banns of matrimony and marriages published or solemnized in the churches and places mentioned in the first column of the schedule to this Act between the dates mentioned as respects each such church or place in the second column of that schedule shall be as valid as if they had been published or solemnized in a church duly consecrated and licensed for marriages.

Legalizing
marriages
solemnized
in certain
churches.

(2.) All banns of matrimony and marriages published or solemnized in the church of St. Mary, Greenhithe, Kent, in respect of persons residing on board the two training ships moored in the Thames off Greenhithe before the seventeenth day of October one thousand eight hundred and ninety-nine shall be as valid as if those two training ships had been comprised, as they now are, within the new parish of St. Mary, Greenhithe.

(3.) A minister who has solemnized any marriage to which this section refers shall not be liable to any ecclesiastical censure, or to any proceedings for penalties whatsoever, by reason of having solemnized the marriage.

(4.) The register of the marriages so solemnized, or copies of the register, shall be received in all courts as evidence of those marriages in the same manner as registers of marriages in parish churches or copies thereof are by law receivable in evidence.

Short title. 2. This Act may be cited as the Marriages Legalization Act, 1901.

SCHEDULE.

Church or Place.	Dates.
The church of the district (now new parish) of New Basford (Nottingham).	Between 15th March, 1877, and 27th May, 1897.
Christ Church, Bradford (York).....	Between 3rd December, 1879, and 30th November, 1899.
St. Andrew's Church, Dalton-le-Dale (Durham).	Between 12th July, 1877, and the date of the passing of this Act.
The church of the new parish of the Lodge (Salop).	Between 23rd April, 1878, and 27th July, 1899.
The church of the parish of Llansaint-fraid Cwmtoyddwr or Cwmdauddwr (Radnor).	Between 26th October, 1865, and 15th June, 1899.
St. Helens Church, Ore (Sussex).....	Between the date of the consecration of the church in 1870 and 27th July, 1899.
St. Saviour's Church, Ringley (Lancaster).	Between 10th June, 1854, and 7th November, 1895.
St. John's Old Church, Sleights (York), in the Ancient Chapelry of Ugglebarnby.	Between 1st January, 1828, and the date of the passing of this Act.
St. John's New Church, Sleights (York), in the Ancient Chapelry of Ugglebarnby.	Between 20th September, 1895, and the date of the passing of this Act.
The church of the Ancient Chapelry of Ugglebarnby (York).	Between 1st January, 1828, or the date of the consecration of the church if before the 1st January, 1828, and the date of the passing of this Act.
St. John's Church, in the district (now new parish) of St. John, Ipswich (Suffolk).	Between 9th December, 1899, and 8th March, 1900.
St. Peter's Church, Woodmansey, in the parish of Beverley Minster (York).	Between 9th December, 1898, and the date of the passing of this Act.
The parish room of Cadney, in the parish of Cadney-cum-Howsham (Lincoln).	Between 1st January, 1895, and the date of the passing of this Act.
The chapel of Howsham, in the parish of Cadney-cum-Howsham (Lincoln).	Between 1st January, 1899, and the date of the passing of this Act.
St. Tanwg's Church, Harlech, in the parish of Llandanwg, Merioneth.	Between 18th February, 1839, and the date of the passing of this Act.
The parish church of Uldale, in the county of Cumberland.	Between 17th August, 1869, and 4th July, 1901.

3 EDW. 7, C. 26 (MARRIAGES LEGALIZATION ACT, 1903).

An Act to render valid Marriages heretofore solemnized at the Ellerker Chapel-of-Ease, Brantingham, and at the Churches of Saint Mark, Marske-in-Cleveland, All Saints, Brightwaltham (otherwise Brightwalton), and Saint Mary, Great Ilford, and at the Old Baptist Union Chapel, Grays Thurrock, and Marriages solemnized after banns published at the Mission Room in the Parish of Marrick. [14th August, 1903.]

WHEREAS the Ellerker Chapel-of-Ease, in the parish of Brantingham, in the county and diocese of York, was rebuilt and consecrated for the performance of divine service in the year eighteen hundred and forty-four, but does not appear to have been licensed by the bishop of the said diocese or otherwise for the publication of banns and the solemnization of marriages therein:

And whereas the church of Saint Mark, in the parish of Marske-in-Cleveland, in the county and diocese of York, was built and consecrated in the year eighteen hundred and sixty-seven, and the church of All Saints in the parish of Brightwaltham (otherwise Brightwalton), in the county of Berkshire and diocese of Oxford, was built and consecrated in the year eighteen hundred and sixty-three, and in each case the church so built was intended to be substituted for the ancient parish church of the parish, but it does not appear that any deed of substitution was executed at the time:

And whereas by a deed of substitution dated the twenty-fourth of April nineteen hundred and two, the church of Saint Clement, Great Ilford, in the county of Essex and diocese of Saint Alban's, was substituted as the parish church for the old parish church of Saint Mary, and the latter church thereby ceased to be one in which marriages could legally be solemnized until again licensed by the bishop:

And whereas divers marriages have nevertheless been solemnized in the said chapel and churches respectively:

And whereas in the years nineteen hundred and one and nineteen hundred and two certain marriages were solemnized in the Old Baptist Union Chapel at Grays Thurrock, in the district of Orsett, in the county of Essex, and the said chapel was not registered by the registrar general pursuant to the Marriages Act, 1836:

6 & 7 Will. 4,
c. 85.

And whereas since the month of September in the year eighteen hundred and ninety-three certain banns have been published in the Mission Room of the parish of Marrick in the North Riding of the county of York and in the diocese of Ripon, and certain marriages have been solemnized after those banns, but that Mission Room was not licensed for the publication of banns:

And whereas it is expedient under the circumstances aforesaid to remove all doubts touching the validity of the marriages so solemnized:

Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Validation of
certain
marriages
heretofore
solemnized.

1.—(1.) All banns of matrimony and marriages published and solemnized before the passing of this Act in the said Ellerker Chapel-of-Ease and in the said churches of Saint Mark, Marske-in-Cleveland, All Saints, Brightwaltham (otherwise Brightwalton), and Saint Mary, Great Ilford, shall be as valid as if they had been published and solemnized in a church duly consecrated and licensed for marriages.

(2.) All marriages solemnized in the said Old Baptist Union Chapel at Grays Thurrock, in the district of Orsett, in the county of Essex, during the years aforesaid, shall be as valid as if the said chapel had been duly registered in accordance with the provisions of the above recited Act before the solemnization of those marriages.

(3.) All banns published in the said Mission Room in the parish of Marrick since the month of September in the year eighteen hundred and ninety-three, and all marriages solemnized after those banns, shall be as valid as if the Mission Room had been duly licensed for the publication of banns.

(4.) A minister who has solemnized any marriage to which this section refers shall not be liable to any proceedings for penalties whatsoever, or to any ecclesiastical censure, by reason of having solemnized the marriage.

(5.) The register of the marriages so solemnized, or copies of the register, shall be received in all courts as evidence of those marriages in the same manner as registers of marriages duly solemnized, or copies thereof, are by law receivable in evidence.

2. This Act may be cited as the Marriages Legalization Act, 1903.

Short title.

49 & 50 VICT. C. 27 (GUARDIANSHIP OF INFANTS).

An Act to amend the Law relating to the Guardianship and Custody of Infants. [25th June, 1886.]

WHEREAS it is expedient to amend the law relating to the guardianship and custody of infants.

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as the Guardianship of Infants Act, Short title. 1886.

2. On the death of the father of an infant, and in case the father should have died prior to the passing of this Act then from and after the passing of this Act, the mother if surviving shall be the guardian of such infant, either alone when no guardian has been appointed by the father, or jointly with any guardian appointed by the father. When no guardian has been appointed by the father, or if the guardian or guardians appointed by the father is or are dead, or refuses or refuse to act, the Court may, if it shall think fit, from time to time appoint a guardian or guardians to act jointly with the mother.

On death of father, mother to be guardian alone or jointly with others.

3.—(1.) The mother of an infant may by deed or will appoint any person or persons to be guardian or guardians of such infant after the death of herself and the father of such infant (if such infant be then unmarried), and where guardians are appointed by both parents they shall act jointly.

Mother may appoint guardian, in certain cases.

(2.) The mother of any infant may by deed or will provisionally nominate some fit person or persons to act as guardian or guardians of such infant after her death jointly with the father of such infant, and the Court, after her death, if it be shown to the satisfaction of the Court that the father is for any reason unfitted to be the sole guardian of his children, may confirm the appointment of such guardian or guardians who shall thereupon be authorized and empowered so to act as aforesaid, or make such other order in respect of the guardianship as the Court shall think right.

(3.) In the event of guardians being unable to agree upon a question affecting the welfare of an infant, any of them may apply to the Court for its direction, and the Court may make such order or orders regarding the matters in difference as it shall think proper.

Powers of
guardian.

4. Every guardian in England and Ireland under this Act shall have all such powers over the estate and the person, or over the estate (as the case may be), of an infant as any guardian appointed by will or otherwise now has in England under the Act twelve Charles the Second, chapter twenty-four, or in Ireland under the Act of the Irish Parliament fourteen and fifteen Charles the Second, chapter nineteen, or otherwise.

Court may
make orders
as to custody.

5. The Court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Act, and in every case may make such order respecting the costs of the mother and the liability of the father for the same or otherwise as to costs as it may think just.

Power to
Court to
remove
guardian.

6. In England and Ireland the High Court of Justice, in any division thereof, and in Scotland either division of the Court of Session, may, in their discretion, on being satisfied that it is for the welfare of the infant, remove from his office any testamentary guardian, or any guardian appointed or acting by virtue of this Act, and may also, if they shall deem it to be for the welfare of the infant, appoint another guardian in place of the guardian so removed.

Guardianship
in case of
divorce or
judicial
separation.

7. In any case where a decree for judicial separation, or a decree either nisi or absolute for divorce, shall be pronounced, the Court pronouncing such decree may thereby declare the parent by reason of whose misconduct such decree is made to be a person unfit to have the custody of the children (if any) of the marriage; and, in such case, the parent so declared to be unfit shall not, upon the death of the other parent, be entitled as of right to the custody or guardianship of such children.

Application
of Act to
Scotland.

8. In the application of this Act to Scotland the word "guardian" shall mean tutor, and the word "infant" shall mean pupil.

Interpreta-
tion of terms.

9. In the construction of this Act the expression "the Court" shall mean—

In England the High Court of Justice or the county court of the district in which the respondent or respondents or any of them may reside.

In Ireland the High Court of Justice or the county court of the district in which the respondent or respondents or any of them may reside.

In Scotland the Court of Session or the sheriff court within whose jurisdiction the respondent or respondents or any of them may reside.

Any application under this Act to the High Court of Justice in England or to the High Court of Justice in Ireland shall be made to the Chancery Division of the said Courts respectively in such manner as may be prescribed by rules of court.

In Scotland the expression "the Court of Session" shall mean either division of the said Court, and in vacation the Lord Ordinary on the bills.

10. In England and Ireland when any application has been made under this Act to a county court the High Court of Justice shall, at the instance of any party to such application, order such application to be removed to the High Court of Justice and there proceeded with before a judge of the Chancery Division, on such terms as to costs as it may think proper.

As to removing proceedings and appeals.

In England and Ireland an appeal shall lie to the High Court of Justice from any order made by a county court under this Act; and, subject to any rules of court made after the passing of this Act, any such appeal shall be heard by a judge of the Chancery Division of the High Court of Justice at chambers or in court, as he shall direct.

In Scotland any application made under this Act to a sheriff court may be removed to the Court of Session, at the instance of any party, in the manner provided by and subject to the conditions prescribed by the ninth section of the Sheriff Courts (Scotland) Act, 1877.

40 & 41 Vict. c. 50.

In Scotland an appeal shall lie to either division of the Court of Session from any order made by the Lord Ordinary on the bills or a sheriff court under this Act.

11. Rules for regulating the practice and procedure in any proceeding under this Act, and the forms in such proceedings may from time to time be made—

Rules as to procedure.

- (a) So far as respects the High Court of Justice or Her Majesty's Court of Appeal in England or Ireland by rules of court; and
- (b) So far as respects the Court of Session in Scotland by Act of Sederunt; and
- (c) So far as respects any county court in England or Ireland and the Sheriff Court in Scotland in like manner as rules and orders respecting those courts can respectively for the time being be made.

Tutors.

12. In Scotland tutors being administrators-in-law, tutors-nominate, and guardians appointed or acting in terms of this Act who shall, by virtue of their office, administer the estate of any pupil, shall be deemed to be tutors within the meaning of an Act passed in the twelfth and thirteenth years of the reign of her Majesty, intituled “An Act for the better protection of the property of pupils, absent persons, and persons under mental incapacity, in Scotland,” and shall be subject to the provisions thereof: provided always, that such tutors being administrators-in-law, tutors-nominate, and guardians aforesaid shall not be bound to find caution in terms of the twenty-sixth and twenty-seventh sections of the last recited Act, unless the Court, upon the application of any party having interest, shall so direct.

Saving clause.

13. Nothing in this Act contained shall restrict or affect the jurisdiction of the High Court of Justice in England, and of the High Court of Justice in Ireland, or of any division of the said courts, and of the Court of Session in Scotland, to appoint or remove guardians, or (in the case of Scotland) tutors or factors *loco tutoris* or otherwise in respect of infants.

21 & 22 VICT. c. 93 (THE LEGITIMACY DECLARATION Act, 1858).

See *ante*, Chap. XIII., pp. 204—207.

58 & 59 VICT. c. 39 (SUMMARY JURISDICTION (MARRIED WOMEN) ACT, 1895).

See *ante*, Chap. XIV., pp. 212—215.

5 EDW. 7, c. 23 (PROVISIONAL ORDER (MARRIAGES) ACT, 1905).

An Act to enable Provisional Orders to be made for removing any invalidity or doubt attaching to Marriages by reason of some informality. [11th August, 1905.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal,

and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.—(1.) A Secretary of State may, in the case of marriages solemnized in England which appear to him to be invalid or of a doubtful validity by reason of some informality, make a provisional order for the purpose of removing such invalidity or doubt. Provisional orders for removing doubts as to the validity of marriages.

(2.) The draft of every such order shall be advertised, in such manner as the Secretary of State thinks fit, not less than one month before the order is made, and the Secretary of State shall consider all objections to the order sent to him in writing during that month, and shall, if it appears to him necessary, direct a local inquiry into the validity of any such objections.

(3.) An order of the Secretary of State under this Act shall be of no force unless confirmed by Parliament, and the Secretary of State may bring in a Bill for confirming the order; and if while a Bill confirming any such order is pending in either House of Parliament a petition is presented against the order, the Bill, so far as it relates to the order, may be referred to a Select Committee, and the petitioner shall be allowed to appear and oppose as in the case of Private Bills.

2. This Act may be cited as the Provisional Order (Marriages) Short title. Act, 1905.

6 EDW. 7, C. 40 (MARRIAGE WITH FOREIGNERS ACT, 1906).

An Act to amend the Law with respect to Marriages between British Subjects and Foreigners.

[29th November, 1906.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.—(1.) Any British subject who desires to be married in a foreign country to a foreigner according to the law of that country may, if it is desired for the purpose of complying with the requirement of the law of that country to obtain the certificate hereinafter mentioned, give notice of the marriage, if resident in the United Kingdom, to the registrar, and if resident abroad to the marriage officer, and apply to the registrar or Marriages of British subjects with foreigners abroad.

officer for a certificate that after proper notices have been given no legal impediment to the marriage has been shown to the registrar or officer to exist, and the registrar or officer shall, after the conditions set out in the Schedule to this Act have been complied with, give the certificate applied for, unless the certificate is forbidden or a caveat is in operation as provided in that Schedule, or some legal impediment to the marriage is shown to the registrar or officer to exist.

(2.) If a person—

- (a) knowingly and wilfully makes a false oath or signs a false notice of marriage for the purpose of a certificate under this section; or
- (b) forbids the granting of a certificate under this section by falsely representing himself to be a person who is authorized to forbid the certificate, knowing that representation to be false,

that person shall be guilty of perjury, and, if the offence is committed abroad, may be tried in any county or place in the United Kingdom in which the offender may be, and dealt with in all respects, as if the offence had been committed in that county or place.

(3.) If any person enters a caveat on grounds which the registrar or officer, or, in case of appeal, the Registrar-General declares to be frivolous, that person shall be liable to pay as a debt to the applicant for the certificate such sum as the registrar or officer or, in the case of appeal, the Registrar-General considers to be proper compensation for the damage caused to the applicant by the entering of the caveat.

(4.) Such fees may be charged in respect of any notice of an intended marriage, or any application for, or grant of a certificate, or the entering of a caveat under this section, as may be fixed, as respects certificates to be granted by or caveats entered with registrars, by the Registrar-General, with the consent of His Majesty in Council, and, as regards certificates to be granted by or caveats entered with a marriage officer, as may be fixed by Order under the Consular Salaries and Fees Act, 1891.

54 & 55 Vict.
c. 36.

**Marriage of
foreigners
with British
subjects in
the United
Kingdom.**

2.—(1.) Where arrangements have been made to the satisfaction of His Majesty with any foreign country for the issue by the proper officers of that country, in the case of persons subject to the marriage law of that country proposing to marry British subjects in the United Kingdom, of certificates that after proper notices have been given, no impediment according to the law of

that country has been shown to exist to the marriage, His Majesty may, by Order in Council, make regulations—

(a) requiring any person, subject to the marriage law of that country, who is to be married to a British subject in the United Kingdom, to give notice of the fact that he is subject to the marriage law of that country to the person by or in the presence of whom the marriage is to be solemnized: and

(b) forbidding any person to whom such a notice has been given to solemnize the marriage or allow it to be solemnized until such a certificate as aforesaid is produced to him.

(2.) If any person knowingly acts in contravention of, or fails to comply with, any such regulation he shall be liable to a fine not exceeding one hundred pounds, or to imprisonment for a term not exceeding one year.

(3.) Nothing in this section shall be taken to relate or have any reference to any marriages between two persons professing the Jewish religion solemnized according to the usages of the Jews in the presence of a secretary of a synagogue authorized by either the Births and Deaths Registration Act, 1836, or the Marriages (Ireland) Act, 1844, or by the Marriage and Registration Act, 1856, to register such a marriage, or of a deputy appointed by such secretary by writing under his hand, and approved by the President for the time of the London committee of deputies of the British Jews by writing under his hand.

3. His Majesty may by Order in Council make general regulations prescribing the forms to be used under this Act and making such other provisions as seem necessary or expedient for the purposes of this Act, and may by Order in Council revoke, alter, or add to any Order in Council made under this Act.

6 & 7 Will. 4,
c. 86.
7 & 8 Vict.
c. 81.
19 & 20 Vict.
c. 119.

Power to
make general
regulations.

4. In this Act unless context otherwise requires,—

The expressions “Registrar-General” and “registrar” mean respectively the Registrar-General within the meaning of the Births and Deaths Registration Act, 1836, and a superintendent registrar of marriages within the meaning of the Marriage Act, 1836; and

The expression “marriage officer” means a marriage officer for the time being under the Foreign Marriage Act, 1892, and includes any person for the time being empowered to register a marriage under section 18 of that Act.

Interpreta-
tion.

55 & 56 Vict.
c. 23.

Application
to Scotland.

5. In the application of this Act to Scotland—

- (1.) References to the forbidding of a certificate shall not apply;
- (2.) A reference to a caveat shall be construed as a reference to an objection, and the provisions respecting the entry of a caveat on frivolous grounds shall not apply;
- (3.) The expressions “Registrar-General” and “registrar” mean respectively the Registrar-General of births, deaths, and marriages in Scotland, and the registrar of births, deaths, and marriages for a parish or district under the Registration of Births, Deaths, and Marriages (Scotland) Act, 1854, and the Acts amending that Act.
- (4.) Paragraph (a) of sub-section one of section two shall be read as if the following words were inserted after the word “solemnized,” namely, “or to any registrar, law agent, or other person whom he desires to draw up any declaration of irregular marriage between him and a British subject”; and paragraph (b) of the same sub-section shall be read as if the following words were inserted after the word “solemnized,” namely, “or to aid in effecting the said irregular marriage”;
- (5.) The duly appointed minister of a synagogue shall be substituted in sub-section (3) of section two for the secretary of the synagogue or deputy as described in that sub-section.

17 & 18 Vict.
c. 80.

Application
in Ireland.

6. In the application of this Act to Ireland the expressions “Registrar-General” and “registrar” mean respectively the Registrar-General and registrar within the meaning of the Marriages (Ireland) Act, 1844.

Short title.

7. This Act may be cited as the Marriage with Foreigners Act, 1906.

7 EDW. 7, c. 16 (EVIDENCE (COLONIAL STATUTES) ACT,
1907).

An Act to facilitate the admission in evidence of statutes passed by the Legislatures of British possessions and protectorates including Cyprus. [21st August, 1907.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal,

and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.—(1.) Copies of Acts, ordinances, and statutes passed (whether before or after the passing of this Act) by the Legislature of any British possession, and of orders, regulations and other instruments issued or made, whether before or after the passing of this Act, under the authority of any such Act, ordinance, or statute, if purporting to be printed by the Government printer, shall be received in evidence by all courts of justice in the United Kingdom, without any proof being given that the copies were so printed.

Proof of
statutes of
British
possessions.

(2.) If any person prints any copy or pretended copy of any such Act, ordinance, statute, order, regulation, or instrument which falsely purports to have been printed by the Government printer, or tenders in evidence any such copy or pretended copy which falsely purports to have been so printed, knowing that it was not so printed, he shall, on conviction, be liable to be sentenced to imprisonment with or without hard labour for a period not exceeding twelve months.

(3.) In this Act—

The expression “Government printer” means, as respects any British possession, the printer purporting to be the printer authorized to print the Acts, ordinances or statutes of the Legislature of that possession, or otherwise to be the Government printer of that possession:

The expression “British possession” means any part of His Majesty’s dominions exclusive of the United Kingdom, and, where parts of those dominions are under both a central and a local Legislature, shall include both all parts under a central Legislature and each part under a local Legislature.

(4.) Nothing in this Act shall affect the Colonial Laws Validity Act, 1865.

28 & 29 Vict.
c. 63.

(5.) His Majesty may by Order in Council extend this Act to Cyprus and any British protectorate, and where so extended this Act shall apply as if Cyprus or the protectorate were a British possession, and with such other necessary adaptations as may be made by the order.

2. This Act may be cited as the Evidence (Colonial Statutes) Act, 1907.

7 EDW. 7, C. 47 (DECEASED WIFE'S SISTER'S MARRIAGE
ACT, 1907).

*An Act to amend the Law relating to Marriage with a
Deceased Wife's Sister.* [28th August, 1907.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Marriage
with a
deceased
wife's sister
not to be
deemed void
as a civil
contract
except in
certain cases.

1. No marriage heretofore or hereafter contracted between a man and his deceased wife's sister, within the realm or without, shall be deemed to have been or shall be void or voidable, as a civil contract, by reason only of such affinity: Provided always that no clergyman in holy orders of the Church of England shall be liable to any suit, penalty, or censure whether civil or ecclesiastical, for anything done or omitted to be done by him in the performance of the duties of his office to which suit, penalty, or censure he would not have been liable if this Act had not been passed.

Provided also, that when any minister of any church or chapel of the Church of England shall refuse to perform such marriage service between any persons who, but for such refusal, would be entitled to have the same service performed in such church or chapel, such minister may permit any other clergyman in holy orders in the Church of England, entitled to officiate within the diocese in which such church or chapel is situate, to perform such marriage service in such church or chapel.

Provided also that in case, before the passing of this Act, any such marriage shall have been annulled or either party thereto (after the marriage and during the life of the other) shall have lawfully married another, it shall be deemed to have become and to be void upon and after the day upon which it was so annulled, or upon which either party thereto lawfully married another as aforesaid.

Saving of
existing
rights and
interests.

2. No right, title, estate or interest, whether in possession or expectancy, and whether vested or contingent at the time of the passing of this Act, existing in, to, or in respect of, any dignity, title of honour, or property, and no act or thing lawfully done or omitted before the passing of this Act shall be prejudicially affected nor shall any will be deemed to have been revoked by reason of any marriage heretofore contracted as aforesaid being

made valid by this Act. And no claim by the Crown for duties leviable on or with reference to death and before the passing of this Act due and payable, and no payment, commutation, composition, discharge, or settlement of account in respect of any duties leviable on or with reference to death before the passing of this Act duly made or given, shall be prejudicially affected by any thing herein contained.

Nothing in this Act shall affect the devolution or distribution of the real or personal estate of any intestate, not being a party to the marriage, who at the time of the passing of this Act shall be, and shall until his death continue to be, a lunatic so found by inquisition.

3.—(1.) Nothing in this Act shall remove wives' sisters from the class of persons adultery with whom constitutes a right on the part of wives to sue for divorce under the Matrimonial Causes Act, 1857. Saving for
20 & 21 Vict.
c. 85, s. 27.

(2.) Notwithstanding anything contained in this Act or the Matrimonial Causes Act, 1857, it shall not be lawful for a man to marry the sister of his divorced wife, or of his wife by whom he has been divorced during the lifetime of such wife.

4. Nothing in this Act shall relieve a clergyman in holy orders of the Church of England from any ecclesiastical censure to which he would have been liable if this Act had not been passed, by reason of his having contracted or hereafter contracting a marriage with his deceased wife's sister. Liability of
clergyman to
ecclesiastical
censure.

5. In this Act the word sister shall include a sister of the half-blood. Interpreta-
tion.

6. This Act may be cited as the Deceased Wife's Sister's Marriage Act, 1907. Short title.

9 EDW. 7, C. 39 (OATHS ACT, 1909).

An Act to amend the Law as to Oaths.

[25th November, 1909.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited for all purposes as the Oaths Act, 1909, and the Oaths Act, 1888, and this Act may be cited together as the Oaths Acts, 1888 and 1909. Short title.
51 & 52 Vict.
c. 46.

Manner of
administra-
tion of oaths.

2.—(1.) Any oath may be administered and taken in the form and manner following:—

The person taking the oath shall hold the New Testament, or in the case of a Jew, the Old Testament, in his uplifted hand, and shall say or repeat after the officer administering the oath the words, "I swear by Almighty God that . . .," followed by the words of the oath prescribed by law.

(2.) The officer shall (unless the person about to take the oath voluntarily objects thereto, or is physically incapable of so taking the oath) administer the oath in the form and manner aforesaid without question: Provided that, in the case of a person who is neither a Christian nor a Jew, the oath shall be administered in any manner which is now lawful.

Definition.

3. In this Act the word "officer" shall mean and include any and every person duly authorized to administer oaths.

Commence-
ment and
extent.

4.—(1.) This Act shall come into operation on the first day of January nineteen hundred and ten.

(2.) This Act shall not apply to Scotland.

SUPREME COURT, ENGLAND.

PROCEDURE.

THE RULES OF THE SUPREME COURT (POOR PERSONS). DATED
APRIL 28, 1913.

ORDER XVI.

Part IV. (Rules 22 to 31, both inclusive) of Order XVI. of the Rules of the Supreme Court, 1883, is hereby repealed and the following Rules shall stand in lieu thereof, viz.:—

IV.—*Proceedings by and against Poor Persons.*

22. Any person may be admitted to take or be a party to any legal proceedings as a poor person on satisfying the Court or a Judge that he has a reasonable cause of action or defence and that his means do not exceed the sum of £50 (excluding his wearing apparel, household goods, tools of trade and the subject matter of the action) or such larger sum not exceeding £100 as the Judge may under special circumstances and having regard to the probable cost of the litigation personally direct.

23. There shall be kept by the prescribed officer in every Division of the High Court, and in such District Registries as the Lord Chancellor shall from time to time direct:—

- (1) Lists of solicitors and of counsel willing to be assigned to inquire into and report upon the application of any person to take or be a party to any legal proceedings as a poor person.
- (2) Lists of solicitors and of counsel willing to be assigned to assist poor persons when admitted in the conduct of the proceedings.

24. A person desirous of being so admitted as a poor person shall make an application in the form stated in the Appendix hereto (which may be cited as Form No. 1J of Appendix K to the Rules of Supreme Court, 1883) stating his means, and the name of any proposed party to such proceedings and the nature of the applicant's case, and giving the names and addresses of two or more persons to whom reference can be made.

25. The application shall be referred for enquiry to one or more solicitors or counsel willing to act in the matter and whether named in the list to be kept pursuant to Rule 23 (1) or not, who shall report whether and upon what terms the applicant ought to be admitted as a poor person. For the purpose of their report, the reporters may make such enquiries as they think fit as to the means and position of the applicant and as to the merits of his case and may require the attendance of the applicant and may hear any other person, and may require facts to be proved by affidavit. It shall also be competent to the reporters if and whenever having regard to the nature of the case before them they deem it desirable to invite the attendance before them of any opposite party and in making their report they shall have regard to the probable cost of the litigation in relation to the matter in dispute.

26. Upon the production of the report mentioned in the preceding paragraph the Court or a Judge may admit the applicant to take or be a party to legal proceedings, as a poor person. And the Court or Judge or proper officer shall assign to the applicant a solicitor and a counsel (whether named in the list kept pursuant to Rule 23 (2) or not) to assist him in the conduct of the proceedings, but no solicitor or counsel who shall have reported on the case shall be so assigned nor shall any co-partner of a solicitor who shall have so reported be so assigned. It shall not be lawful for the applicant to discharge any solicitor or counsel so assigned without the leave of the Court or Judge.

27. A solicitor or counsel assigned under Rule 26, shall not be at liberty to refuse his assistance unless he satisfies the proper officer or the Court or a Judge that he has some good ground for refusing.

28. When a person is applying or is admitted to take or be a party to any legal proceedings as a poor person, he shall not be liable to any court fees nor to pay costs to any other party, except as provided by the Rules of this Order, and no person shall take or agree to take or seek to obtain from him any fees, profit, or reward, either for the enquiry or report or for the conduct of the proceedings; and any person so doing shall be guilty of a contempt of court. Provided that nothing contained in this rule shall preclude any solicitor or counsel from receiving remuneration out of any fund which may from time to time be created by the Treasury for the payment of the out-of-pocket expenses or other charges of solicitors or the fees of counsel so assigned. If any person so applying or admitted shall give or agree to give any such fee, profit or reward, his application or

admission, as the case may be, may be dismissed or struck out, in which case he shall not afterwards be admitted as a party in the same cause as a poor person unless otherwise ordered.

29. Notwithstanding the preceding Rule costs ordered to be paid to a poor person shall unless the Court or a Judge shall otherwise order, be taxed as in other cases, and in the event of the Judge certifying that the person ordered to pay such costs has acted unreasonably in prosecuting or defending the proceedings such costs shall include such fees for solicitor and other expenses (not including fees to counsel unless paid or payable out of such fund as aforesaid) as might properly have been allowed in an ordinary action, and as the taxing master shall determine.

30. When a substantial amount is recovered by a poor person so admitted the Court or a Judge may order the payment out of the amount so recovered to the solicitor of such taxed costs (not including fees of counsel unless paid or payable out of such fund as aforesaid) as would have been allowed to the solicitor on taxation between himself and his client if he had been retained by his client in the ordinary manner, less such amount as may be recovered from any other party provided that the total amount so paid out shall not exceed one-fourth of the amount recovered.

31. Any fees or other charges allowed on taxation under either of the preceding Rules which shall have been already paid out of such fund as aforesaid shall be refunded to the Treasury.

31A. Every notice of motion summons or petition on behalf of a poor person (except an application for admission to take or be a party to legal proceedings or for discharge of his solicitor) shall be signed by his solicitor. It shall be the duty of the solicitor to take care that no such application be made without due cause.

Where in the opinion of the Judge any such application has been made without due cause the Court may—

- (1) Order that the solicitor shall pay the costs of such application of the opposite party or,
- (2) Order that in the event of the applicant recovering any substantial amount in the action the costs of the opposite party of such application shall be set off against the amount recovered.

31B. There shall be no appeal by a person admitted to sue or defend as a poor person under these Rules without the leave of the Court or the Judge by whom the matter is tried or of the Court of appeal.

31c. If any person who has not taken or been a party to any legal proceedings as a poor person in the High Court shall desire to be admitted on the appeal to the Court of Appeal as a poor

RULES OF THE SUPREME COURT (POOR PERSONS).

person the like procedure shall be followed as is provided by these rules for the High Court and the application shall be referred by the Court of Appeal or proper officer for enquiry as if the application were made in that Division of the High Court from which the appeal is brought.

31D. The prescribed officer shall be (1) in the Chancery Division such one of the Masters as the Lord Chancellor shall from time to time nominate for the purpose; (2) in the King's Bench Division such one of the Masters as the Lord Chief Justice shall from time to time nominate for the purpose; (3) in the Probate, Divorce and Admiralty Division such one of the Registrars as the President shall from time to time nominate for the purpose; and (4) in a District Registry the District Registrar.

32. These Rules may be cited as the Rules of the Supreme Court (Poor Persons), or may be cited by the heading and number thereof with reference to the Rules of the Supreme Court, 1883. They shall come into operation on the 12th day of October, 1913.

APPENDIX.

IN THE HIGH COURT OF JUSTICE, [CHANCERY] DIVISION.

In the matter of an action [or proposed action, or other proceeding as the case may be].

[State the parties to the action, short particulars of the nature of the proposed action, or other proceeding, and the names and addresses of the persons to whom reference may be made.]

I, the above named _____ of _____ in the County of _____ hereby apply to be admitted as a poor person to prosecute [or defend] the above-mentioned action [or proposed action or other proceeding], and I declare that my means (excluding my wearing apparel, household goods, and tools of trade and the subject-matter of the proposed action or other proceeding) do not exceed the sum of £ _____

Signed

To the prescribed officer

Dated the 28th day of April, 1913.

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